Supreme Court, U.S.
FILED
99 1496 MAR 8 2000
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

GIA KALYNA JANAKAKIS-KOSTUN,

Petitioner,

v.

EMMANUEL JANAKAKIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Article 13b of the Hague Convention on the Civil Aspects of International Child Abduction permits a court to deny a petition to return a child to the country of the child's habitual residence, where "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (the "grave risk" exception).

1. Does the "grave risk" exception require a court to exclude evidence of alleged "physical or psychological harm" (including admitted evidence of violence in the home), if such harm does not include evidence of direct physical abuse of the child?

2. Before a trial court may deny a petition for return of the child under the "grave risk" exception, is the court also required to find that the country of habitual residence is unable to provide the child with adequate protection, when that requirement is not found in the plain language of Article 13b?

RULE 29.6 STATEMENT

There are no parent or subsidiary companies to be listed under the provisions of Rule 29.6.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Gia Kalyna Janakakis-Kostun, by her undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Court of Appeals in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Kentucky Court of Appeals (App. 1a-17a) is reported at 6 S.W.3d 843. The opinions of the district court (App. 18a-36a; 37a-40a) and the denial of discretionary review by the Supreme Court of Kentucky (App. 47a) are unreported. Related stay proceedings in the Kentucky Court

of Appeals, in the Supreme Court of Kentucky, and in the United States Supreme Court (App. 41a-46a) are unreported.

JURISDICTION

The Kentucky Court of Appeals denied Petitioner's timely appeal on March 19, 1999. The Supreme Court of Kentucky denied Petitioner's timely motion for discretionary review on December 9, 1999. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

TREATY AND STATUTORY PROVISIONS INVOLVED

Articles 1, 3, 12, and 13 of the Hague Convention on the Civil Aspects of International Child Abduction are reproduced in the Appendix at 55a-57a. Sections 11601 and 11603 of the International Child Abduction Remedies Act, 42 U.S.C. § 11601–10 (1994), are reproduced in the Appendix at 58a-61a.

STATEMENT OF THE CASE

Petitioner seeks review of the Kentucky Court of Appeals' adoption of a narrow construction of the "grave risk" exception under the Hague Convention on the Civil Aspects of Child Abduction ("Hague Convention" or "Convention"). This construction, which resulted in the lower courts' failure to consider evidence of Respondent's violent behavior and temperament, is at odds with the language and purpose of Article 13b and conflicts with the construction of the "grave risk" exception adopted by other federal and state courts.

Under the Hague Convention, a "wrongful removal" of a child from her country of "habitual residence" requires the return of the child unless one of the Convention's exceptions applies. *See* App. 56a. Article 13b permits a court to preclude the return of the child if the respondent to a Hague

Convention petition proves by clear and convincing evidence that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation" (hereinafter, the "grave risk" exception). App. 57a; *see also* 42 U.S.C. § 11603(e)(2).

Neither the Convention nor the United States' implementing legislation, the International Child Abduction Remedies Act, 42 U.S.C. § 11601 *et seq.* ("ICARA"), defines the term "grave risk" or articulates the categories of evidence that courts may consider in determining whether the exception has been met. As a result, both state and federal courts, vested with concurrent jurisdiction under the treaty,[1] have divided over the proper standard to be applied under Article 13b, including the admissibility of evidence proving "physical or psychological harm" and the significance of evidence of domestic violence in the home not directly inflicted upon the child. The split of authority is replicated at the international level, where courts of other signatory countries differ greatly in their construction of the "grave risk" exception.[2]

Because this case reflects the narrow application of the Article 13b standard by some lower state and federal courts, it provides an appropriate opportunity for this Court to resolve a significant disagreement among United States jurisdictions and between United States and foreign court applications of the Hague Convention.

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[1] *See* 42 U.S.C. § 11603(a).

[2] United States courts, in turn, rely upon these conflicting international decisions to support their own Article 13b determinations. *Compare Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) and *In re Walsh*, 31 F. Supp.2d 200, 205-06 (D. Mass. 1998) *with Steffen F. v. Severina P.*, 966 F. Supp. 922, 927 (D. Ariz. 1997) (citing cases decided in other signatory countries).

I. FACTUAL BACKGROUND

This case was initiated by Respondent's March 28, 1997 motion to the Hardin Circuit Court of Kentucky to return the parties' only child, Bronte Judith-Despina ("Bronte"), to Greece pursuant to the Hague Convention.

Petitioner Gia Kostun, a United States citizen, married Respondent Emmanuel Janakakis, a citizen of Greece and a captain in the Greek Navy, on September 2, 1989. Their daughter, Bronte, was born in Greece on October 2, 1991. The parties' marriage deteriorated, and on May 2, 1996, Ms. Kostun permanently departed the marital residence. Both she and Mr. Janakakis initiated custody proceedings in the Greek courts, which resulted in a temporary award of custody to Ms. Kostun on June 28, 1996.

In late July and early August 1996, while Ms. Kostun had temporary custody of Bronte, Ms. Kostun made plans to leave Greece with Bronte. Ms. Kostun's father assisted them. Upon their arrival to the United States, Ms. Kostun and Bronte lived in Kentucky.

In Ms. Kostun's absence, Mr. Janakakis filed for and received custody of Bronte in the Greek courts on February 28, 1997. Following the award of custody, Mr. Janakakis filed a Hague Convention petition for Bronte's return in the Hardin Circuit Court on March 28, 1997.

After a three day trial, the trial court found, *inter alia*, that Ms. Kostun had presented insufficient evidence to satisfy an Article 13b defense. The trial court ordered Bronte's return to Greece on November 12, 1997 (App. 36a) and again by order denying Ms. Kostun's motion to alter, amend, or vacate, on January 28, 1998 (App. 40a).

At trial and on appeal, Ms. Kostun presented numerous accounts demonstrating Mr. Janakakis' violent behavior and temperament in order to establish an Article 13b defense.

First, Ms. Kostun offered evidence that Mr. Janakakis had physically abused Bronte while Ms. Kostun and Bronte lived with Mr. Janakakis. *See Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 850 (Ky. Ct. App. 1999) (App. 11a). In addition, Ms. Kostun alleged that Bronte suffered from physical and emotional abuse after Ms. Kostun left the home, during a period when a Greek court had awarded temporary custody of Bronte to Mr. Janakakis. Specifically, when Mr. Janakakis relinquished custody of Bronte to Ms. Kostun pursuant to a subsequent temporary custody order, Ms. Kostun alleged, but Mr. Janakakis denied, that Bronte was suffering from a variety of physical and emotional problems. *See id.* at 846 (App. 4a). Witnesses also testified that Bronte exhibited a propensity to hoard her food instead of eat it, as well as an irrational fear of dog cages. (Hearing before Judge Steven Bland, Hardin Circuit Court, Video Tape 2: 10/02/97, 14:19:12). Ms. Kostun also offered the testimony of child psychologist David Winsch, who examined Bronte on several occasions and documented the child's signs of psychological, physical, and sexual abuse, but this evidence was rejected by the trial court as not credible. *See* 6 S.W.2d at 850 (App. 12a).

Second, Ms. Kostun offered evidence that Mr. Janakakis had physically abused Ms. Kostun on a number of occasions. Mr. Janakakis acknowledged inflicting violence on Ms. Kostun (which required Ms. Kostun's hospitalization). *See id.* at 850 (App. 11a-12a). Ms. Kostun also demonstrated that several of the custody proceedings in Greece were conducted entirely in Greek, and that Ms. Kostun (who does not speak the language) did not have a court-appointed interpreter.[3] (Tape 3: 10/03/97, 11:37:34)

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[3] The U.S Department of State has documented that the courts of Greece frequently minimize allegations of domestic violence. *See* U.S. Department of State, *Greece Country Report on Human Rights Practices for*

Third, Petitioner offered, on appeal, the translated opinion of a June 28, 1996 order of the Lower Court of Chania, Greece (hereinafter "Chania Order") which awarded temporary custody to Ms. Kostun. *See* App. 48a-54a; *see also* 6 S.W.3d at 846, 850 (App. 3a-4a, 12a).[4] The order documented Mr. Janakakis' violent behavior towards Bronte and Ms. Kostun and his authoritarian, manic-depressive and abusive personality. Specifically, the Chania Order found that (1) Mr. Janakakis "regularly struck [Ms. Kostun] with his fists and his guns (he is lieutenant commander of the Navy Force), causing her bodily injuries, as well as hitting their minor daughter," and (2) Mr. Janakakis is "cyclothymic [i.e. manic-depressive], inconsistent, authoritarian and violent." App. 50a.

The Court of Appeals failed to consider the Chania Order and the Greek court's finding that Mr. Janakakis was abusive toward Bronte and Ms. Kostun. In addition, the trial court instructed Ms. Kostun's attorney not to "dwell on" questions about Mr. Janakakis' abuse of Ms. Kostun. (Tape 1: 10/01/97, 15:15:45). Despite numerous accounts of Mr. Janakakis' violent behavior, the trial court, and the Court of Appeals on de novo review, found that only the following facts were established by Ms. Kostun:

> (1) Emmanuel's regular manner of punishing Bronte is to "give her a smack in the back"; (2) on one occasion Emmanuel went into a

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1997, at 10 (Jan. 30, 1998), *cited in* Appellant's Reply Brief at 4, *Janakakis-Kostun* (Ky. Supreme Ct.) (No. 98-SC-123).

[4] Article 13b provides, "[i]n considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." App. 57a.

> violent rage, destroyed items in the house, and pushed Gia and Bronte to the floor; (3) on one occasion Emmanuel pulled Gia's hair so violently during a quarrel that she was hospitalized with severe neck injuries; and (4) on one occasion Emmanuel tore up Bronte's passport.

6 S.W.3d at 850 (App.11a-12a). As detailed below, the Court of Appeals' failure to consider evidence of a generally abusive environment including evidence of Mr. Janakakis' abuse of Ms. Kostun and his authoritarian personality, under an improperly narrow construction of Article 13b, resulted in a finding that Ms. Kostun failed to satisfy an Article 13b defense.

While Ms. Kostun appealed the judgment, the Court of Appeals denied an emergency stay pending appeal on February 11, 1998 (App. 41a). On March 20, 1998, the Chief Justice of the Kentucky Supreme Court granted a temporary stay pending further order of the full Supreme Court (App. 42a-44a). On May 14, 1998, the Kentucky Supreme Court denied Ms. Kostun's motion to reconsider and dissolved the temporary stay entered by the Chief Justice. (App. 45a). On June 18, 1998, Justice John Paul Stevens of the Supreme Court of the United States denied an application to stay the judgment pending appeal. (App. 46a). On March 19, 1999, the Court of Appeals denied Ms. Kostun's appeal. (App. 1a-17a). The Supreme Court of Kentucky denied Ms. Kostun's motion for discretionary review on December 9, 1999. (App. 47a). On June 29, 1998, Ms. Kostun delivered Bronte to Mr. Janakakis, who returned with Bronte to Greece.

II. THE COURT OF APPEALS DECISION

ICARA makes clear that the exceptions to the Hague Convention are to be narrowly construed. *See* 42 U.S.C. § 11601(a)(4). Specifically, when determining whether there

is a "grave risk" of harm, a court may not consider "custody" evidence, or the merits of any underlying custody disputes. *See* 42 U.S.C. § 11601(b)(4); *see also* 6 S.W.3d at 850 (App. 13a). Despite this direction, ICARA does not delineate what constitutes "custody" evidence, or what constitutes "grave risk" evidence, and as a result, courts have diverged over the admissibility of certain categories of evidence presented in support of an Article 13b defense. *Compare Tabacchi v. Harrison,* No. 99 C 4130, 2000 WL 190576, at *12-13 (N.D. Ill. Feb. 10, 2000) (deeming evidence of spousal abuse not probative) *with Rodriguez v. Rodriguez,* 33 F. Supp.2d 456, 462 (D. Md. 1999) (denying petition for children's return by considering evidence of spousal abuse).

In this case, the Court of Appeals delineated the "grave risk" exception by adopting a standard originally articulated in dicta by the United States Court of Appeals for the Sixth Circuit in *Friedrich v. Friedrich,* 78 F.3d 1060, 1069 (6th Cir. 1996):

> [w]e believe that a grave risk of harm for the purposes of the [Hague] Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute – e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

6 S.W.3d at 850 (App. 13a) (quoting *Friedrich,* 78 F.3d at 1069).

In so holding, the Court of Appeals adopted an unduly narrow test for determining "grave risk" – a test that would preclude the trial court from considering evidence of harm such as violence in the home and the serious psychological disorders of a Hague Convention petitioner. Under that standard, even assuming that the Hague Convention petitioner's home country is not a "zone of war, famine, or disease," the respondent still must satisfy both elements of a two-part test. First, the Hague respondent must demonstrate clear and convincing evidence of "serious abuse or neglect" committed by the petitioner directly against the child. The Kentucky courts concluded that evidence of spousal abuse, as Ms. Kostun presented, was "not competent evidence" under this standard, where the harm was directed to the spouse, not directly to the child. *See id.* at 851 (App. 13a) (finding "no competent evidence that *Bronte* has been abused or neglected by Emmanuel.") (emphasis added). Second, the respondent also must demonstrate that that the courts of the child's habitual residence are unable or unwilling to protect the child from the demonstrated harm.

Under this restrictive test, the Court of Appeals ignored significant portions of the evidence presented by Ms. Kostun and affirmed the trial court's holding that "[m]ost of the evidence presented by Gia was more closely akin to that which might be relevant in a custody proceeding." *Id.* at 850 (App. 12a). However, no court has determined that the evidence indicating that Mr. Janakakis had a violent temperament with the potential for, and history of, abusing his wife, is unsubstantiated. To the contrary, the trial court and appellate courts in Kentucky have dismissed this evidence as irrelevant "custody" proceeding evidence. As discussed below, this result is at odds with the construction of the "grave risk" exception adopted by other courts on nearly identical facts.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE DISAGREEMENT AMONG STATE AND FEDERAL COURTS CONCERNING EVIDENCE TO BE CONSIDERED IN ESTABLISHING THE "GRAVE RISK" EXCEPTION

A. Overview Of The Disagreement Among Lower Courts

In adopting the Article 13b test articulated by the Sixth Circuit in *Friedrich,* the Kentucky Court of Appeals aligned itself with other courts that have limited "grave risk" to those situations where the Hague Convention petitioner has directly abused the child, rather than where the petitioner has inflicted physical or psychological harm on the child through other means, such as spousal abuse. *See, e.g, Croll* v. *Croll*, 66 F. Supp.2d 554, 561 (S.D.N.Y. 1999) ("[T]he Article 13 exception is only applicable when a child, as opposed to a parent, would be placed in danger"); *In re Walsh*, 31 F. Supp.2d 200, 205 (D. Mass. 1998) (grave risk "must be directed at the children"); *Freier v. Freier,* 969 F. Supp. 436, 442 (E.D. Mich. 1996) (evidence of psychological harm "is only relevant if it helps prove the existence of one of [the *Friedrich* exceptions]"); *Zarate v. Perez*, No. 96 C 50394, 1996 WL 734613, at *4 (N.D. Ill. Dec. 23, 1996) (not considering evidence that the petitioner sexually abused the child's sibling); *In re Petition for Writ of Habeas Corpus for Coffield*, 96 Ohio App.3d 52, 57, 644 N.E.2d 662, 665 (Ohio App. Ct. 1994) (refusing to consider any information about the specific family environment to which the child would return); *Cf. Tabacchi*, 2000 WL 190576, at *12-13 (although the court's inquiry "must encompass some evaluation of the people and circumstances" awaiting the child, evidence of spousal abuse was irrelevant); *Currier v. Currier*, 845 F. Supp. 916, 923 (D. N.H. 1994) (although the court is required to consider "the

surroundings" to which the child will be sent, the court's focus was limited to the grave risk "that the situation seriously presents for the children").

Other courts, however, have rejected the standard articulated by the Sixth Circuit as "too narrow and mechanical." *See Tahan v. Duquette*, 259 N.J. Super. 328, 335, 613 A.2d 486, 489 (N.J. Super Ct. App. Div. 1992) ("[A] court in the petitioned jurisdiction, in order to determine whether a realistic basis exists for apprehensions concerning the child's physical safety or mental well-being, must be empowered to evaluate the surroundings to which the child is to be sent and the basic personal qualities of those located there."); *accord Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 378 (8th Cir. 1995) ("To ensure that the child is adequately protected, the Article 13b inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence."); *Blondin v. Dubois*, 78 F. Supp.2d 283, 298 (S.D.N.Y. 2000) ("The gloss placed on Article 13b by the Sixth Circuit . . . is unwarranted and narrows the 'grave risk' exception to the point where it is virtually written out of the Convention."); *Steffen F. v. Severina P.*, 966 F. Supp. 922, 927 (D. Ariz. 1997) (rejecting *Friedrich* as too narrow).

Some courts, while not explicitly rejecting *Friedrich,* have similarly extended the "grave risk" exception to include considerations of evidence beyond narrow proof of direct physical or sexual abuse of a child and have examined the behavior and character of the Hague Convention petitioner. *See, e.g., Blondin v. Dubois,* 189 F.3d 240, 242 (2d Cir. 1999) (affirming finding of grave risk where trial court had examined spousal abuse and other factors); *Rodriguez,* 33 F. Supp.2d at 460 (denying father's petition for return of children where he had regularly beaten their mother in addition to child); *Krishna v. Krishna*, No. C 97-0021 SC, 1997 WL

195439, at *4 (N.D. Cal. Apr. 11, 1997) (considering, in the absence of evidence of a "direct threat" to the child, the "tempestuous" nature of the relationship between the parents); *Steffen*, 966 F. Supp. at 927-28 (holding that "bonding and attachment" between child and mother is by itself sufficient to find grave risk); *Panazatou v. Pantazatos*, No. FA 960713571S, 1997 WL 614519, at *3 (Conn. Super. Ct. Sept. 24, 1997) (finding "grave risk" where child's separation from her mother would cause psychological harm); *cf. Ciotola v. Fiocca*, 86 Ohio Misc.2d 24, 684 N.E.2d 763 (Ohio C.P. 1997) (considering spousal abuse but finding insufficient proof of harm to the child); *Renovales v. Roosa*, No. FA 91 0392232 S, 1991 WL 204483, at *5-6 (Conn. Super. Ct. Sept. 27, 1991) (considering cultural differences between two environments and granting child's return to father because he was "a man who loves his children, has provided for them adequately, and who wants the best for his kids").

- The inconsistent treatment of evidence of spousal violence illustrates the disagreement among lower courts as to the evidence that may be considered in establishing the "grave risk" exception. Some courts find that the psychological effects of spousal abuse on the child are no different from the psychological effects of physical abuse of the child, and consider it accordingly. *See, e.g., Rodriguez*, 33 F. Supp.2d at 461 (noting testimony that the child who witnessed her father abusing her mother and brother suffered from the same symptoms as her abused brother).[5] Other courts categorically

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[5] Numerous experts and scholars have documented that "merely witnessing parental violence is detrimental" to a child's psychological and developmental health. Hon. Sheila M. Murphy, *Guardians Ad Litem: The Guardian Angels of Our Children in Domestic Violence Court*, 30 LOY. U. CHI. L.J. 281, 284 (1999). In fact, "[o]bserving domestic violence is as harmful for children as experiencing direct physical violence." Daniella Levine, *Children in Violent Homes: Effects and Responses*, 68-OCT

distinguish the harm to the child from the harm to the spouse in order to exclude spousal abuse evidence. *See Tabacchi*, 2000 WL 190576, at *12; *Croll*, 66 F. Supp.2d at 561-62; *Walsh*, 31 F. Supp.2d at 205.

In this case, Mr. Janakakis' repeated acts of violence against Ms. Kostun, as well as Bronte, and his volatile psychological state, are critical aspects of the environment to which Bronte would be (and has been) exposed upon return to Greece. The Court of Appeals' failure to consider facts relating to the environment to which the child would return is at odds with the decisions of several other courts faced with similar cases. *See Rodriguez*, 33 F. Supp.2d at 461-62; *Blondin*, 78 F. Supp.2d at 294-95; *Krishna*, 1997 WL 195439, at *1; *Steffen*, 966 F. Supp. at 927-28; *Panazatou*, 1997 WL 614519, at *3.

B. The Kentucky Court Of Appeals Diverged From *Friedrich* By Requiring "Certain" Harm

Notwithstanding the apparent disagreement among lower courts, and even assuming that the *Friedrich* test is the appropriate one, the Kentucky Court of Appeals erred by construing the "grave risk" test even more narrowly than the language of *Friedrich* (or the plan language of the treaty) permits. For this reason alone, certiorari is appropriate to correct the erroneously narrow standard adopted by the Court of Appeals.

The Court of Appeals construed the *Friedrich* language more strictly than the *Friedrich* court itself, by requiring the

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FLA. B.J. 62, 63 (1994); *accord* Pauline Quirion et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. PUB. INT. L.J. 501, 508 (1997); Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1112 (1995).

Hague Convention respondent to prove by clear and convincing evidence "certain danger," rather than a "grave risk of harm." 6 S.W.3d at 851 (App. 13a) (rejecting Ms. Kostun's Article 13b defense because, in the Court's opinion, there was no evidence that "Bronte faces *certain* danger in Greece") (emphasis added). Neither *Friedrich* nor the plain language of Article 13b supports the imposition of a "certain danger" requirement. Rather, Article 13b clearly states that a party opposing a petition under the Convention must show by clear and convincing evidence that "there is a *grave risk* that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." App. 57a (emphasis added). While exceptions to the Convention are to be construed narrowly, *see, e.g., Nunez-Escudero*, 58 F.3d at 376, a "grave risk" of harm does not require a showing of "certain" harm, and indeed, such a requirement is contrary to the plain language of the Convention. Under a "certain danger" standard, even in the most blatant cases of physical or sexual abuse by the petitioner against the child, it would be unreasonably burdensome, if not impossible, for the parent opposing the petition to prove that the child would be at risk of "certain" harm.

Moreover, even under a literal reading of *Friedrich*, which limits the court's considerations to "serious abuse or neglect of the child," 78 F.3d at 1069, the Court of Appeals should have considered the Chania Order, which documented the fact that Mr. Janakakis did in fact physically abuse Bronte. *See* App. 50a. Yet the Court of Appeals, rather than considering this evidence on *de novo* review, made only a passing reference to the Chania Order without acknowledging its full substantive content. *See* 6 S.W.3d at 846 (App. 4a) (noting only that the Chania Order did not disturb an earlier prohibition against Bronte's removal from Greece). This exclusion demonstrates the Court of Appeals' erroneously narrow construction of the "grave risk" exception, which is at odds

with *Friedrich* itself. This error is itself grounds for summary reversal of the judgment below.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG FEDERAL AND STATE COURTS ON WHETHER THE "GRAVE RISK" EXCEPTION REQUIRES AN ADDITIONAL ASSESSMENT OF THE COUNTRY OF HABITUAL RESIDENCE

The Kentucky Court of Appeals, in adopting the Sixth Circuit's construction of "grave risk," required Ms. Kostun to establish not only "serious abuse or neglect" but also that "the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection." 6 S.W.3d at 850 (App. 13a). In doing so, the Court of Appeals followed similar decisions that refuse to recognize an Article 13b defense until the Hague Convention respondent establishes the inadequacy of remedies available in the child's home country -- even where the respondent also establishes evidence otherwise sufficient to establish "grave risk." *See, e.g., Blondin,* 189 F.3d at 242 (affirming trial court's finding of "grave risk" but remanding for determination of whether child could nonetheless be returned to France); *Croll,* 66 F. Supp.2d at 562 (concluding that respondent "adduced no evidence that the Hong Kong courts would be incapable or unwilling to protect" the child if she were placed in danger); *Walsh*, 31 F. Supp.2d at 206-07 (declining to find that authorities in Ireland were unwilling or unable to intervene to protect children).

In contrast, other courts have rejected the imposition of this additional requirement not contemplated by the plain language of the Convention, recognizing that a required evaluation of the adequacy of foreign courts impermissibly narrows the meaning of Article 13b. Most notably, the

United States Court of Appeals for the Eighth Circuit expressly rejected this aspect of *Friedrich*:

> We reject [petitioner's] argument. however, that the Article 13b "intolerable situation" exception applies only if the government agencies and courts of Mexico are unable to protect the child if he is returned to that country. It is clear that Article 13b requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint. If that were all that were required, the drafters of the Convention could have found a clear, more direct way of saying so.

Nunez-Escudero, 58 F.3d at 377 (internal punctuation and citation omitted). The United States District Court for the Southern District of New York, upon remand for a determination of whether children found to be at "grave risk" of harm could nonetheless be protected in France, similarly concluded that:

> [I]n directing me to consider whether other alternatives were available that would allow the return of the children to France while protecting them from harm, the Second Circuit implied that my findings that [petitioner] had seriously abused the children were insufficient to establish a "grave risk of harm" under Article 13b without an additional finding that no other options existed by which the children could be safely returned to France. These interpretations of Article 13b are, in my view, unduly narrow.

Blondin, 78 F. Supp.2d at 298.

Other decisions also reject *Friedrich*'s additional requirement by ending the analysis of "grave risk" once the courts find evidence of harm to the child. *See, e.g., Rodriguez,* 33 F. Supp.2d at 461-62; *Steffen,* 966 F. Supp. at 928-29.

In requiring Ms. Kostun to establish the inadequacy of the Greek court system, the Court of Appeals erroneously narrowed the meaning of Article 13b and implied a provision into the Convention that is not supported by its plain language or purpose. Ms. Kostun presented evidence regarding the leniency of the Greek courts toward domestic violence, and the Greek courts' failure to provide her with an interpreter, but the Kentucky courts did not consider this evidence.

The Court of Appeals' summary conclusion that "there is no evidence that the courts in Greece cannot protect Bronte," 6 S.W.3d at 851 (App. 13a-14a), illustrates how unduly burdensome it would be for any Hague Convention respondent, including Ms. Kostun, to establish an Article 13b defense once allocated this additional burden. *Cf. Blondin*, 78 F. Supp.2d at 287-91 (illustrating the court's expansive assessment of the French government and country pursuant to the Second Circuit's direction to examine the adequacy of the foreign system). Because the Court of Appeals' decision exemplifies a significant split of authority, certiorari is appropriate to determine the proper scope of inquiry under Article 13b.

III. THIS CASE IS THE APPROPRIATE VEHICLE FOR RESOLVING AN IMPORTANT ISSUE ARISING UNDER A FEDERAL TREATY

This is an appropriate case to resolve a significant disagreement among federal and state courts over the proper construction of a central exception under the Hague Convention. This is not an issue where two federal circuits disagree; rather, dozens of federal and state courts have ruled on this

issue. Thus, there is no reason to await further decisions by the lower courts.[6]

As in cases involving statutory or constitutional interpretation, certiorari is equally necessary to resolve the meaning of a federal treaty provision. *See Air France v. Saks,* 470 U.S. 392, 394 (1985) (granting certiorari to resolve a conflict among the Courts of Appeals as to the meaning of a term in the Warsaw Convention). With respect to the Hague Convention in particular, the varied authority among lower courts demonstrates "how difficult it can be for American judges to decide what to do with children in cases governed by international treaties and influenced by differences in cultural, ethnic, or religious heritages."[7]

Certiorari is especially appropriate where, as here, a treaty vests concurrent jurisdiction in federal and state courts. This Court is the only judicial authority that can provide uniform guidance with respect to any law of concurrent jurisdiction.[8] Additionally, under the Hague Convention, the possibility of conflicting decisions is heightened because it implicates both international and domestic family law issues. State courts decide Hague Convention cases without international law

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[6] At least 130 reported or electronically available decisions have applied or cited the Hague Convention since the Convention was enacted into force in the United States in 1988, but this Court has never addressed any case arising under that treaty.

[7] Benjamin Wiser, *Another International Custody Fight, Minus the Spotlight,* N.Y. TIMES NEWS SERV., January 9, 2000.

[8] For example, this Court has required federal law preemption under Section 301 of the Labor Management Relations Act, a statute conferring concurrent jurisdiction, because of "the possibility of conflicting substantive interpretation under competing legal systems [that] would tend to stimulate and prolong disputes." *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 104 (1962).

expertise, and federal courts decide Hague Convention cases without child welfare law expertise. Certiorari is therefore appropriate to minimize the risk of inconsistent judgments.

Moreover, because a primary purpose of the Convention is to prevent forum shopping to the detriment of the child, *see generally* 42 U.S.C. § 11601, jurisdictional uniformity within the United States is particularly important. Without consistency, parents will consider the leniency of the jurisdiction when deciding whether to file a Hague petition, or alternatively, whether to remove children from the country of habitual residence.

Guidance from this Court is needed, not only to resolve conflicts within the United States, but also to further the United States' important interest in uniform interpretation, as specified in the treaty itself. *See* 42 U.S.C. § 11601(b)(3) (recognizing "the need for uniform international interpretation of the Convention").

In addition, the standard articulated by this Court will likely affect the other signatories' varied interpretations of the same treaty. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251, 1274 (1989). A uniform message to other signatory countries is particularly desirable when the United States' interest in securing the return of abducted American children is involved. The National Center for Missing and Exploited Children estimates that as many as ten percent of 165,000 parental kidnapping cases a year involve one parent taking a child abroad.[9] Fewer than forty percent of American children taken abroad illegally are ever

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[9] Cindy Loose, *Anxious Eyes on Elian Case*, WASH. POST, Feb. 3, 2000, at A1.

returned, according to the U.S. State Department.[10] Certiorari is therefore appropriate to minimize the risk of varied and unpredictable findings of "grave risk" by other signatory countries, or extreme interpretations implicating American children.[11]

For these reasons, a decision by this Court would promote predictability and uniformity in the proper standard to be applied under the "grave risk" exception under Article 13b of the Hague Convention, both in the United States and in other signatory countries.

CONCLUSION

This Court should grant the petition for a writ of certiorari and order plenary briefing and argument or, in the alternative, summarily reverse the judgment below.

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[10] Kelly McBride, *Kids Taken Overseas Usually Stay,* SPOKESMAN REV., Feb. 6, 2000.

[11] Courts in other signatory countries have refused to return American children to the United States with far less evidence of "grave risk" than was presented by Petitioner in this case. For example, the Supreme Court of Ireland recognized an Article 13b exception due to the intolerable situation created by an American father's mismanagement of money. *See* Tom Harper, *The Limitations of the Hague Convention and Alternative Remedies of a Parent Including Reabduction*, 9 EMORY INT'L L.J. 257, 261 (1995) A French court refused to return a child to Los Angeles, where the polluted environment in Los Angeles constituted a danger to the child's health. *See id.* A German court ruled that returning a child to an English-speaking country, after years away from the United States, would establish "severe psychological stress." Loose, *supra note* 9, at A8.

Respectfully submitted,

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MARCH 8, 2000

APPENDICES

Appendix A

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 1998-CA-000259-MR

GIA KAYLNA JANAKAKIS-KOSTUN, APPELLANT
v.
IN RE THE APPLICATION OF
EMMANUEL JANAKAKIS, APPELLEE

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 97-CI-00493

OPINION
AFFIRMING

BEFORE: EMBERTON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE. This is an appeal by Gia Kaylna Janakakis-Kostun (Gia) from an order of the Hardin Circuit Court granting the motion of appellee, Emmanuel Janakakis (Emmanuel), to require Gia to relinquish custody of the parties' daughter, Bronte-Judith-Despina (Bronte), to Emmanuel and permitting the return of the child to Greece. This matter arose on Emmanuel's motion to return the parties' child, Bronte, to Greece pursuant to the terms of the Hague Convention on the Civil Aspects of Child Abduction, October 25, 1980, 1988 WL 411501 (entered into

force December 1, 1983) (hereinafter Hague Convention). The Hague Convention has been signed by the United States, and Congress has adopted procedures for its implementation by enactment of the International Child Abduction Remedies Act. 42 U.S.C. § 11601, et seq. Greece is likewise a signatory to the Hague Convention. We affirm.

Emmanuel is a citizen of Greece and a captain in the Greek Navy. In 1986, while on a two-year assignment to the United States Naval Base at San Diego, California, Emmanuel met Gia, a member of the U.S. Navy, and a relationship developed between the parties. In 1988, Emmanuel's tour of duty in the United States ended, and he returned to Greece. At about the same time, Gia decided to leave the U.S. Navy. In November 1988, Gia traveled to Greece to be with Emmanuel, and the parties were married on September 2, 1989. On October 2, 1991, Bronte, was born in Chania, Greece, on the Island of Crete. Following Bronte's birth, Gia and Bronte made yearly visits to the United States to visit Gia's relatives, though, because of conflicting evidence, the trial court was unable to determine the exact dates and duration of the visits. However, Gia and Bronte spent approximately three to four months in the United States in each of the years 1992, 1993, and 1994.

At some point the parties' marriage began to deteriorate, and sometime in 1995 Gia threatened to leave with Bronte. Consequently, Emmanuel began to have concerns about Gia removing Bronte from Greece without his knowledge or permission. On February 24, 1996, Gia told Emmanuel that she was going to the United States and was going to take Bronte with her. Gia thereupon left the marital residence in Chania, taking Bronte with her, and went to Athens with the intention of flying to the United States and settling permanently. Emmanuel thereupon filed a criminal

complaint charging Gia with interfering with his custodial rights.

On February 27, 1996, Emmanuel filed a petition in the Lower Court of Athens, Security Measure Division, seeking temporary custody of Bronte. The Court issued an order prohibiting the removal of Bronte from Greece and scheduled a hearing on the merits of Emmanuel's petition. Gia attempted to leave Greece with Bronte on February 27, but, pursuant to the court order, this was prevented by Greek authorities. Gia alleges that subsequent to her detention, she and Bronte were abused by Greek authorities. On March 28, 1996, a hearing was held in the Athens Court. On April 22, 1996, the Athens Court issued an order prohibiting the removal of Bronte from Greece until a final determination of custody.

On February 28, 1996, the aforementioned criminal charge was heard by an Athens Court. The charges were dropped after the hearing. Emmanuel claims that the charges were dropped because all he wanted was to keep Bronte in Greece, not actually prosecute Gia. Gia claims the charges were dropped following an evidentiary hearing because the judge found the charges to be without merit. In any event, the charges were dropped and Gia was released from custody. Gia and Bronte thereupon returned to live with Emmanuel at the parties' marital residence. On May 2, 1996, Gia departed the marital residence with Bronte and went to the Greece hotel lodgings of her father, George William Kostun. Emmanuel subsequently retrieved Bronte from the hotel and refused to allow Gia to communicate with Bronte.

Also on May 2, Gia filed a petition in the Lower Court of Chania seeking custody of Bronte. On June 28, the Chania Court issued an order, inter alia, assigning "temporarily to [Gia] the care of . . . [Bronte] until issuance of the

final judgment[.]" The Chania order recognized that the April 28 Athens order prohibited the removal of Bronte from Greece and did not set aside or otherwise disturb that prohibition. Pursuant to the Chania order, on July 1, Emmanuel relinquished custody of Bronte to Gia. Gia alleges that upon Bronte's return to her, Bronte was suffering from a variety of physical and emotional problems, though this is denied by Emmanuel. A final hearing was set on Gia's custody petition for September 5, 1996. On July 4, Emmanuel filed a petition seeking specific rights of communication and visitation with Bronte. On July 22, the Chania court awarded Emmanuel liberal visitation and communication rights with Bronte. The order threatened Gia with a fine and imprisonment for violation of the visitation and communication rights established therein.

When Emmanuel subsequently attempted to exercise his communication and visitation rights, he was unable to locate Gia and Bronte. As it turns out, sometime in late July or early August 1996, Gia, with the help of her father, a former Green Beret with multiple European contacts, smuggled Bronte out of Greece. Upon arriving in the United States, Gia and Bronte initially stayed, variously, with Gia's father in Gray Hawk, Kentucky, with Gia's mother in Houston, Texas, and in Elizabethtown, Kentucky. Finally, sometime in the Spring of 1997, Gia and Bronte came to Elizabethtown where they remained.

In the meantime, Emmanuel sought to find his daughter. On July 27, 1996, he filed another action in the Chania Court. A hearing was set on that action for January 16, 1997. On September 5, 1996, the hearing on Gia's petition was held as scheduled. While Gia, no longer in Greece, did not appear, Emmanuel testified that her attorney was present. That hearing was continued until January 16, 1997, so that all pending matters could be heard together. Following

the January 16, 1997, hearing, by order dated February 28, 1997, the Lower Court of Chania assigned "exclusively to [Emmanuel] the exertion and care of [Bronte] [.]"

On November 14, 1996, Emmanuel applied for relief with the Greek Central Authority responsible for implementing the Hague Child Abduction Convention. He first sought enforcement of the Hague Convention in Houston in March of 1997. On March 28, 1997, Emmanuel filed a petition in Hardin Circuit Court pursuant to the Hague Convention, where service on Gia was obtained. On November 13, 1997, the trial court entered an order sustaining Emmanuel's motion for the return of Bronte to his custody and authorizing Bronte's return to Greece. Following a denial of Gia's motion to alter, amend, or vacate, this appeal was taken. On February 11, 1998, this Court denied Gia's petition for an emergency stay of the trial court's order pending appeal; however, on March 20, 1998, Kentucky Supreme Court Chief Justice Robert F. Stephens granted a stay pending further order of the full Supreme Court. On May 14, 1998, the Supreme Court dissolved the temporary stay. On June 18, 1998, United States Supreme Court Justice John Paul Stevens denied Gia's application for a stay pending appeal. On June 29, 1998, Gia delivered Bronte to Emmanuel, and Emmanuel and Bronte returned to Greece.

The Hague Child Abduction Convention and the International Child Abduction Remedies Act each require an abduction or wrongful retention to trigger their provisions and protections. Harsacky v. Harsacky, Ky. App., 930 S.W.2d 410, 413 (1996). Under Article Three of the Hague Convention, removal or retention is considered wrongful where there is a breach of custody rights under the law of the state in which the child was a habitual resident immediately before the removal or retention. Id. It follows that a child cannot be wrongfully removed or retained if the juris-

diction to which the child is taken can be considered its habitual residence. Id. Gia first argues that the trial court erroneously concluded that Greece was the habitual residence of Bronte, and contends that Bronte's habitual residence at the time of her removal was, in fact, the United States.

Neither the Hague Convention nor the International Child Abduction Remedies Act defines "habitual residence." Indeed, it was intended that this concept remain fluid and fact-based, without becoming rigid. Id., citing Brooke v. Willis, 907 F. Supp. 57, 61 (S.D.N.Y. 1995); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993); Friedrich v. Friedrich, 983 F.2d 1396, 1400-1401 (6th Cir. 1993). The definition of habitual residence must be determined by the facts and circumstances presented in each particular case. Id., citing Meredith v. Meredith, 759 F. Supp. 1432, 1434 (D. Ariz. 1991). As reflected in Harsacky, the test for determining habitual residence under the settled purpose analysis is broader than domicile.

There are alternative approaches to determining a child's habitual residence, see Harsacky v. Harsacky, supra, however, this Court has previously decided that a determination of habitual residence "must focus on the child, not the parents, and examine past experience, not future intentions." Harsacky, 930 S.W.2d at 415 (quoting Friedrich v. Friedrich, 983 F.2d at 1401). Under this test, the record supports the trial court's determination that Greece was Bronte's habitual residence immediately prior to her removal.

Following Bronte's birth, the parties at all times maintained their home in Greece, and at no time lived together as a family unit in the United States with the intention of making the United States their permanent home. The evidence shows that Bronte's permanent home, at all times following her birth and prior to her removal, was Greece,

and that her three- to four- month trips to the United States in 1992, 1993, and 1994 were temporary visits to this country for the purpose of visiting her maternal relatives. Greece has been the center of Bronte's life.

Gia's argument that the United States was Bronte's habitual residence because the parties held United States social security numbers, bank accounts, driver's licenses, had once consulted with a U.S. realtor, and had plans to move and settle in the United States following Emmanuel's retirement is unpersuasive. These connections do not overcome Bronte's more prevalent and continuing contacts with Greece.

Also unpersuasive is Gia's assertion that her residence in Greece for the year preceding her departure "was not consensual." The Greek Court orders establish that Emmanuel's efforts to prevent Bronte's removal from Greece, though disapproved of by Gia, were pursuant to Greek law. Even if Gia's last year in Greece was "not consensual" – and the evidence is that she could have returned without Bronte to the United States at anytime – this would not alter Bronte's habitual residence from Greece to the United States.

In view of the foregoing factors, the trial court properly concluded that Bronte's habitual residence was Greece.

Gia next contends that the trial court erroneously concluded that Gia breached Emmanuel's custody rights when she left Greece. The objective of the Hague Convention is to protect children who are "wrongfully removed" from their country of habitual residence. Hague Convention art. 1.

> The Hague Convention art. 3 provides as follows:

> The removal or the retention of a child is to be considered wrongful where --
>
> a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;
>
> and
>
> b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in subparagraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

The burden is on the petitioner, here, Emmanuel, to establish that the minor child was wrongfully removed within the meaning of the Hague Convention by a preponderance of the evidence. 42 U.S.C. § 11603(e)(1); In re Ponath, 829 F. Supp. 363 (D. Utah 1993).

Rights of custody may arise by judicial decision.[1] Hague Convention art. 3. The Athens order of April 22,

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[1] Under the Hague Convention, whether a parent was exercising lawful custody rights over a child at the time of removal must be determined under the law of the child's habitual residency, Hague Convention art. 3; Friedrich,

1996, prohibited Gia from removing Bronte from Greece pending a final resolution of the parties' custody dispute. Admittedly, the Chania decision of June 28, 1996, awarded temporary custody to Gia. The June 28 order, however, also cited the previous prohibition on removing Bronte from Greece. The June 28 order took no action to diminish or lessen the effect of the Athens prohibition of removal. In addition to this, the Chania decision of July 22, 1996, defined liberal and specific visitation rights for Emmanuel and threatened Gia with fines and imprisonment if she violated the provisions of the order. These orders were entered prior to Gia's removal of Bronte and, together, establish beyond a preponderance of the evidence that Emmanuel had custodial rights to Bronte under Greek law by virtue of judicial decision.

Gia's argument, that since the June 28, 1996, Chania order awarded her sole temporary care of Bronte, Emmanuel was divested of all custodial rights, is unpersuasive. The order as translated was, on its face, a temporary order, pending final resolution of the custody issue. Pursuant to the orders, Emmanuel had ongoing "custodial rights" and was, in fact, seeking as a final resolution permanent sole

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938 F.2d at 1402. Neither the trial court, nor either party on appeal, applied or cited relevant Greek statutory or case law relevant to the issue of whether Emmanuel had existing "custody rights" to Bronte at the time of Bronte's removal and whether Emmanuel was "exercising" those "custody rights" at the time of her removal. However, as discussed infra, the record established by a preponderance of the evidence that Emmanuel had custodial rights by "judicial decision," and the ongoing custody litigation in the Greek courts supports that by a preponderance of the evidence he was attempting to "exercise" those rights.

custodial rights for himself. Indeed, following Gia's removal of Bronte, Emmanuel was granted custody of the child by the Chania court in its February 28, 1997 order.

Visitation rights alone, such as those granted to Emmanuel in the July 22, 1996, Chania order have been held to fall within the meaning of "custodial right." See David S. v. Zamira S., 574 N.Y.S.2d 429 (N.Y.Fam. Ct. 1991). David S. acknowledged that visitation rights may not always equate to custodial rights. The case nevertheless held that such a distinction was meritless where a respondent, i.e., the removing parent, engaged in "contemptuous conduct" in removing the child from its habitual residence. In view of the pending court orders prohibiting the removal of Bronte from Greece, Gia similarly acted in contempt of Greek court orders by nevertheless removing Bronte. Accordingly, David S. provides a rule appropriate to this case.

Finally, in view of Emmanuel's active and ongoing legal efforts prior to, at the time of, and subsequent to Gia's removal of Bronte, it is clear that Emmanuel was exercising his custodial rights, or would have but for Gia's removal of Bronte.

Gia next contends that the trial court did not properly consider Gia's evidence that returning Bronte to Greece would subject her to a grave risk of physical and psychological harm under Article 13b. Article 13b establishes an affirmative defense to an otherwise wrongful removal and provides that

> the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --
>
> . . . .

> b there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> . . . .
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

A respondent who opposes the return of the child has the burden of proving that the exception set forth in article 13b exists by clear and convincing evidence. 42 U.S.C. 11603(e)(2). "Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." Rowland v. Holt, Ky., 70 S.W.2d 5, 9 (1934).

Gia alleges that, at trial, she established that Bronte would face an "intolerable situation" if returned to Greece. Gia further alleges that she has established the insufficiency of the Greek judicial system and its unwillingness to protect the interests of non-Greek citizens. In support of this position, Gia cites several examples of violent behavior by Emmanuel toward herself and Bronte. Among these: (1) Emmanuel's regular manner of punishing Bronte is to "give her a smack on the back"; (2) on one occasion Emmanuel went into a violent rage, destroyed items in the house, and pushed Gia and Bronte to the floor; (3) on one occasion Emmanuel pulled Gia's hair so violently during a quarrel that she was hospitalized with severe neck injuries; and (4)

on one occasion Emmanuel tore up Bronte's passport. Gia also refers us to the June 28, 1996, Chania order which recounts accusations of violence by Emmanuel toward herself and Bronte.

Gia moreover presented the testimony of a child psychologist who testified that Bronte was suffering from (1) post-traumatic stress syndrome; (2) probable sexual, physical and emotional abuse; and (3) probable child neglect. The psychologist recommended that Bronte not be returned to Greece. The trial court made a specific finding that it "does not find the psychologist's testimony compelling," and that "[i]t is lacking in substantiation and does not establish that returning Bronte to Greece would subject her to grave and intolerable injury."

We adopt the following analysis of Gia's 13b argument from the order of the trial court:

> The 13(b) exception under the [Hague] Convention must be narrowly construed. Rydder v. Rydder, 49 F.2d 369 (8th Cir. 1995); Nunez-Escudero v. Tice-Menley, 58 F.2d 374 (8th Cir. 1995); Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995). Most of the evidence presented by Gia was more closely akin to that which might be relevant in a custody proceeding. That type of evidence is not relevant in a 13(b) hearing. Tahan v. Dugquette, 613 A.2d 486 (N.J. Super. A.D. 1992); In Re Petition For Coffield, 644 N.E.2d 662 (Ohio App. 11 Dist. 1994). In Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996) [ ] Judge Boggs' opinion very succinctly states how the court should view the 13(b) exception:

The exception for grave harm to the child is not license for a court to speculate on where the child would be happier. That decision is a custody matter, and reserved to the court in the country of habitual residence.

Id. at 1068.

Judge Boggs then goes on to define exactly when the 13(b) exception should apply:

[w]e believe that a grave risk of harm for the purposes of the [Hague] Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute – e.g., returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

Id. at 1069.

The evidence offered by Gia in support of her 13(b) argument, psychological and otherwise, simply does not establish that Bronte faces a grave risk of harm if she is returned to Greece. There is absolutely no competent evidence before the Court that Bronte has been abused or neglected by Emmanuel, or that Bronte faces certain danger in Greece. Likewise, there is no evi-

> dence that the courts in Greece cannot protect Bronte. Indeed, the last order issued before Gia left gave Gia temporary custody, subject to certain conditions. This court has absolutely no reason to believe that the Greek Courts will not properly and adequately decide the ultimate issue of custody, and protect Bronte's interests in so doing. The Court concludes that Gia has failed to satisfy her 13(b) burden.

Gia next alleges that the trial court did not properly consider her evidence that returning Bronte to Greece would violate fundamental principles of human rights under Article 20 of the Hague Convention. More particularly, Gia alleges that (1) the actions of the Greek police in physically removing her and Bronte from a plane in Athens, holding her in isolation at the station for several days without food, water or restrooms, and subjecting her to physical and verbal abuse violated various articles of the International Covenant on Civil and Political Rights, December 16, 1966, 6 I.L.M. 368 (entered into force March 23, 1976) (hereinafter ICCPR); (2) that various articles of the ICCPR were violated when Emmanuel destroyed Bronte's passport and Greek authorities forcibly prevented her and Bronte from moving freely from one place to another; and (3) she was denied assistance of counsel in custody proceedings in violation of the ICCPR. The burden is on Gia to establish an Article 20 exception by clear and convincing evidence. 42 U.S.C. § 11603 (e) (2).

> We adopt the trial court's analysis of this issue:
>
> > Gia also asserts that the return of Bronte to Greece should be denied pursuant to Article 20 of the [Hague] Convention.

Gia's burden under this Article is to show, again by clear and convincing evidence, that the return of Bronte "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.["] [Hague Convention art. 20]. "With respect to an Article 20 defense, it places a heavy burden on the respondent." Caro v. Sher, 687 A.2d 354 (N.J. Super. Ch., 1996). The court in Caro relied on the Explanatory Report as to the adoption of the [Hague] Convention, prepared by Elisa Perez-Vera, to explain Article 20:

To be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the [Hague] Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with those principles . . . A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the [Hague] Convention has in view.

This exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the

> merits or for passing judgment on the political system of the country from which the child was removed.
>
> Caro, supra at 359.
>
> In Gia's case, her complaints are with the way she was treated by the Greek police and court system. Her complaints are no different than those this Court has heard many times before from defendants in proceedings in Kentucky. This Court finds no evidence that the Nation of Greece is suspect in its treatment of Gia and/or Bronte. Gia's Article 20 defense is totally without merit.

Finally, Gia alleges that the trial court's findings of fact should be set aside as clearly erroneous. "Findings of fact shall not be set a side unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ky. R. Civ. Proc. (CR) 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. See Black Motor Company v. Greene, Ky., 385 S.W.2d 954 (1965). The test for substantiality of evidence is whether when taken alone, or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

Gia identifies three examples of erroneous findings by the trial court: (1) the trial court's assertion that "there is simply no evidence in the case before the court that Gia was ever prevented from leaving Greece;" (2) the trial court's erroneous characterization of Gia's departure from Greece as a violation of the Athens court order; and (3) the trial court's disregard of the corroborated testimony pro-

vided by Gia's child psychologist witness which documented Bronte's fragile psychological condition and the severe emotional harm she would suffer if separated from her mother. There was conflicting evidence regarding each of these matters and the trial court, as the finder of fact in this proceeding, was in a better position to weigh the credibility of the witness and resolve the conflicting evidence. There was substantial evidence to support the trial court's findings of fact, and hence we may not set aside those findings.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

RENDERED: March 19, 1999

Appendix B

HARDIN CIRCUIT COURT
DIVISION II

CIVIL ACTION NO. 97-CI-00493

IN RE THE APPLICATION OF
EMMANUEL JANAKAKIS, PETITIONER
v.
GIA KALYNA JANAKAKIS-KOSTUN, RESPONDENT

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT**

INTRODUCTION

This is a proceeding brought by the Petitioner, Emmanuel Janakakis in this Court seeking the return of his daughter, Bronte Judith Despina Anastasia Adair Janakakis (hereinafter referred to as "Bronte"). The Petition is brought pursuant to The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980 and 42 U.S.C. 11603(b), the International Child Abduction Remedies Act. Although this is a Division II case, the undersigned as Circuit Judge for Division I of the Ninth Judicial Circuit (Hardin County) heard the evidence in this matter by agreement of the parties due to a conflict with another trial in progress which was heard by the Division II Circuit Judge, the Hon. Hugh Roark. Having heard extensive evidence in this matter over a period of three days of continuous hearings, having considered the

memorandums of law presented by counsel for the respective parties, and being otherwise sufficiently advised, the Court now makes the following Findings of Fact, Conclusions of Law and Judgment.

PRELIMINARY MATTERS

The Hague Convention

The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter referred to as "Convention") was adopted on October 25, 1980. The United States and Greece were among the signatory States adopting the Convention. Procedures for the implementation of the terms of the Convention in the United States were made by Congress with the enactment of 42 U.S.C. 11601, the International Child Abduction Remedies Act (hereinafter referred to as ICARA). Pursuant to 42 U.S.C. 11603(a) the courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

The objects of the Convention are to (a) secure the prompt return of children wrongfully removed to or retained in any Contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. (Article 1) The United States Congress, in adopting ICARA found that:

> The Convention on the Civil Aspects of International Child Abduction, done at the Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. *Children who are wrongfully removed or retained*

> *within the meaning of the Convention are to be promptly returned* unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and ·· ıtions.

42 U.S.C. 11601(a)(4) (emphasis added).

Pursuant to Article 3 of the Convention, the removal or retention of a child is to be considered wrongful where (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. Article 3 further provides that the rights of custody may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith (Article 12).

There are some exceptions to this mandate, however. Under Article 13 of the Convention, the Court can decline to order the return of the child if the person, institution or other body which opposes its return establishes that (a) the person, institution or other body having the care of the per-

son of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Under Article 20 of the Convention, the Court can decline to order the return of the child "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."

FINDINGS OF FACT

Emmanuel Janakakis (hereinafter referred to as Emmanuel) is a citizen of Greece and a captain in the Greek Navy. In 1986 he was assigned to the United States Naval Base at San Diego, California for a two year assignment working with the U.S. Navy. During his stay at San Diego, Emmanuel met the Respondent, Gia Kalyna Janakakis-Kostun (hereinafter referred to as Gia), a member of the U.S. Navy, and a relationship developed between the parties.

Emmanuel's tour of duty ended in 1988 and he was required to return to Greece. Gia at about the same time decided to leave the U.S. Navy and in July of 1988 left San Diego for Houston, Texas. Emmanuel visited Gia in August of 1988 in Houston and then returned to Greece. In November of 1988, Gia traveled to Greece to be with Emmanuel. They lived together for approximately ten months before getting married on September 2, 1989 in Athens. After the marriage, they continued to live in Greece.

Gia became pregnant and on October 2, 1991, their daughter, Bronte was born in Chania, Greece. After Bronte's birth, Gia and Bronte made yearly visits to the U.S. to visit relatives. The exact dates and duration of said visits is not clear from the evidence, but in each instance,

Gia and Bronte always returned to Greece. As Bronte grew older, she was enrolled first in daycare and then in preschool in Greece.

During this same time period, Gia's marriage to Emmanuel began to deteriorate, although if one believes Gia's account, the marriage was "bad from the beginning." Sometime in 1995 Gia told Emmanuel that she was going to leave and that she "would take Bronte away and he would never see her big brown eyes again." Understandably, Emmanuel began to worry about Gia removing Bronte from Greece without his knowledge or permission.

On February 24, 1996 Gia told Emmanuel that she was going to the United States and taking Bronte with her. Emmanuel went to the Greek police and filed a complaint (on advice of legal counsel) charging Gia with the apparent Greek equivalent of "custodial interference." The next day Emmanuel filed a petition in the Greek courts for temporary custody of Bronte. The Court issued an order prohibiting the removal of Bronte from Greece and scheduled a hearing on the merits of Emmanuel's petition. A hearing was held on March 28, 1996 wherein Emmanuel was awarded temporary custody of Bronte. The Greek court further ordered that Bronte could not be removed from Greece until a final decision was reached. (Order of the Lower Court of Athens, Security Measure Section, Decision Number 11,213/1996, issued April 22, 1996).

The criminal charge of custodial interference was heard by an Athens court on February 28, 1996. The charges were dropped after the hearing. Emmanuel claims the charges were dropped because all he wanted was to keep Bronte in Greece, not actually prosecute Gia. Gia claims the charges were dropped after an evidentiary hearing in front of a judge because the judge found the charges to be without merit. Regardless of the reasons why, the charges

were dismissed and Gia was released from custody. Interestingly enough, she returned to live with Emmanuel and Bronte.

Gia ultimately proceeded with another petition in court seeking custody of Gia. By order of the Lower Court of Chania, decision number 531/1996, Gia was awarded temporary custody of Bronte, but the previous order of the Athens court prohibiting the removal of Bronte from Greece was recognized and not set aside by the Chania Order. Furthermore, the court set a final hearing date of September 5, 1996 on Gia's petition. Subsequent to the entry of that order, Emmanuel relinquished custody of Bronte to Gia on July 1, 1996. Three days later, Emmanuel appeared in court seeking specific rights of communication and visitation, which were granted per written order of The Lower Court of Chania, decision number 617/1996. The nature of the visitation awarded clearly contemplated that Bronte would be residing in Greece for the foreseeable future, as in fact required by the previous order of the Athens Court.

When Emmanuel attempted to exercise his newly awarded rights of communication and visitation, he soon discovered that Gia and Bronte were nowhere to be found. The fact was that Gia and Bronte had left Greece. The manner of their exit is a fascinating story in and of itself. Aware that a court order existed which prohibited Bronte's removal from Greece, Gia relied on her father, George Kostun to arrange their removal. Mr. Kostun is a former Green Beret and probable CIA agent specially trained to infiltrate and work behind enemy lines in eastern European countries. With the help of a string of contacts in various countries, he smuggled Gia and Bronte out of Greece and ultimately to the United States.

Gia and Bronte lived first one place and then another upon their arrival in the United States. Initially, they lived

with her father, George Kostun in Kentucky. Then Gia and Bronte went to Houston to live. Finally, sometime in the Spring of 1997, Gia and Bronte came to Elizabethtown, Kentucky where they now reside.

While Gia and Bronte were traveling around the United States, Emmanuel was busy trying to find his daughter. He filed another action in the Lower Court of Chania on July 27, 1996. A hearing date was set for January 16, 1997. He attended the September 5, 1996 hearing on Gia's petition, but naturally Gia failed to appear, although her attorney apparently was present. The court in that case also set a hearing date of January 16, 1997 so that both matters could be resolved simultaneously. At that hearing, Emmanuel was awarded exclusive custody of Bronte. (Lower Court of Chania, Decision No. 80/1997).

Prior to the January 16, 1997, hearing Emmanuel also applied for relief on November 14, 1996 with the Greek Central Authority responsible for implementing the Hague Child Abduction Convention. He first sought enforcement of the Convention in Houston in March of 1997, and ultimately in this Court, where service on Gia was obtained.

Conclusions of Law

Pursuant to the terms of the Convention, any person seeking the return of a child must prove that the removal was (a) in breach of rights of custody of the petitioner and (b) at the time of removal, those rights were actually exercised. Convention, Article 3. In addition, the child must have been an habitual resident of the State under which the rights of custody were obtained immediately before the removal. Convention, Article 4. The burden of proof which the petitioner must overcome is a preponderance of the evidence. 42 USC 11603(e). If the petitioner satisfies the requirements of Article 3, and the proceedings were initiated within one year of the removal, the Court must order the

return of the child to the requesting State. Convention, Article 12.

There are narrow exceptions to the mandate of Article 12, found in Article 13(b) and Article 20. Any person asserting these exceptions has the burden of proving they apply by clear and convincing evidence. 42 USC 11603(e). This means that in the case before the Court, the Petitioner, Emmanuel, is operating under a preponderance of the evidence standard, while the Respondent, Gia, must deal with the more difficult clear and convincing evidence standard. Although the "clear and convincing evidence" is not specifically defined under Kentucky law, it is clear that it constitutes a heightened degree of proof beyond the ordinary preponderance of the evidence standard. Harding v. Savageau, Ky., 906 S.W.2d 356 (1995).

Having considered the evidence in this case, the Court concludes that the Petitioner, Emmanuel, has satisfied his burden of proof while the Respondent, Gia, has not. For the reasons set forth below, the Court believes that this case is a classic example of the type of matter for which the Convention and ICARA were adopted, and that Bronte should be returned to Greece for further proceedings in the Greek courts.

HABITUAL RESIDENCE

Habitual residence is not defined in either the Convention or ICARA. The failure is intentional.

> Neither the Convention nor the International Child Abduction Remedies Act defines habitual residence. Indeed, it was intended that this concept remain fluid and fact-based, without becoming rigid.

Harsacky v. Harsacky, Ky. App., 930 S.W.2d 410 (1996).

An excellent discussion of habitual residence can be found in Friedrich v. Friedrich, 983 F.2d 1395 (1993) wherein the Sixth Circuit Court of Appeals held, in considering facts amazingly similar to the case before this Court, as follows:

> A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the removal. The court must look back in time, not forward.

In Friedrich the child was born in Germany to a German father and an American mother. In our case the child was born in Greece to a Greek father and an American mother. In Friedrich the child lived exclusively in Germany except for a few short vacations. In our case the child lived exclusively in Greece except for yearly vacations to the United States, always returning to Greece to live. In Friedrich, the mother argued that because the child was a United States citizen, had a United States address, and the mother intended to return to the United States with the child at some future date, the child's habitual residence must be the United States. In our case, the child has dual Greek/United States citizenship, has a United States passport and it was the mother's stated intention that she and the child would return to the United States to live sometime in the future. In Friedrich the court rejected the mother's assertions, stating that the ties to the United States, while strong, do not establish habitual residence. The Court specifically held as follows:

> This is a simple case. Thomas was born in Germany and resided exclusively in Germany until his mother removed him to the United States on August 2, 1991; therefore,

> we hold that Thomas was a habitual resident of Germany at the time of his removal.

In our case, Bronte was born in Greece and resided in Greece exclusively until her mother, Gia, removed her to the United States on or about July 24, 1996. Moreover, there is no evidence that Emmanuel ever intended or consented to Bronte living in the United States. Harsacky, supra. Indeed, the evidence is all to the contrary. Once it became clear that Gia wanted to remove Bronte to the United States, Emmanuel did everything he could to prevent the removal from occurring.

Gia argues that her presence in Greece after the fall of 1995 was coerced and therefore Greece cannot be considered as Bronte's place of habitual residence, citing Application of Ponath, 829 F. Supp. 363 (D. Utah 1993). The facts in Ponath are entirely different from the facts in this case and the Court does not find Ponath applicable. There is simply no evidence in the case before the Court that Gia was ever prevented from leaving Greece. As for Bronte, it is true that Emmanuel obtained orders from the Greek courts preventing her removal prior to a decision on permanent custody being rendered, but that can hardly be considered an act of coercion. Courts in the United States, the Commonwealth of Kentucky included, routinely issue orders prohibiting the removal of, or restricting the travel of, children while custody matters are pending. In addition, under the domestic violence laws of this Commonwealth (KRS 403.715 et seq.) Courts routinely issue ex parte orders for custody, residency and likewise restrict or deny access of one parent to his/her children. Such acts are permitted under Kentucky law and cannot be considered as wrongful or coercive. For that reason, orders issued by Greek courts prohibiting Bronte's removal from Greece do

not constitute coercive conduct by Emmanuel toward Gia and Bronte.

The Court, like the Sixth Circuit did in Friedrich, believes that this is a simple case on the issue of habitual residence. Bronte's place of habitual residence prior to her removal by Gia was clearly Greece. To paraphrase Friedrich, if this Court were to determine that by removing Bronte from her habitual residence without Emmanuel's knowledge or consent Gia "altered" Bronte's habitual residence, the Court would render the Convention meaningless. It would be an open invitation for all parents who abduct their children to characterize their wrongful removals as alterations of habitual residence. This Court will not award Gia's removal of Bronte by holding otherwise. The Court concludes that Bronte's habitual residence prior to her removal was Greece.

RIGHTS OF CUSTODY

Prior to Bronte's removal from Greece, first Emmanuel and then Gia obtained orders from Greek courts granting them temporary custody of Bronte. It is undisputed that at the time Bronte was surreptitiously removed from Greece by Gia, Gia had been awarded temporary custody of Bronte. It is also clear that the previous order of the Greek court prohibiting Bronte's removal from Greece was still in effect. In conjunction with the award of temporary custody of Bronte to Gia, Emmanuel was awarded visitation rights which could only be exercised so long as Bronte remained in Greece. The rights awarded Gia were only temporary – final custody rights were to have been determined at the September 5, 1996 hearing for which Gia failed to appear, although her attorney did. As a result of Gia's failure to appear at the September 5 hearing (scheduled at the time of the award of temporary custody), permanent custody of

Bronte was awarded to Emmanuel by the Greek courts on January 16, 1997.

Under these facts, the Court concludes that the removal of Bronte from Greece by Gia was clearly in breach of rights of custody belonging to Emmanuel. A case very similar to ours in this regard is David S. v. Zamira S., 574 N.Y.S.2d 429 (Fam. Ct. 1991). In this case the father had only visitation rights, but the mother was prohibited from removing the children from the metropolitan area of Toronto, Canada. Despite the prohibition, the mother fled Canada to the United States. The father obtained orders of custody from the Canadian court subsequent to the mother's removal of the children.

The New York Court specifically found as follows:

> Respondent's contention that the petitioner is not entitled under the Hague Convention to have their son returned, because he only had visitation (access) rights and not custody, might have some merit but for the respondent's contemptuous conduct, and the subsequent orders of the Supreme Court of Ontario which gave temporary custody of both children to the petitioner.

(Emphasis added.) Id. at 432.

In the case before this Court, Gia has clearly acted in contempt of the order of the Greek Court prohibiting the removal of Bronte from Greece and Emmanuel was awarded permanent custody of Bronte subsequent to her removal. Furthermore, the Convention defines "rights of custody" as primarily the right to determine the child's place of residence. Article 5. Although Gia had an order of temporary custody, it did not give her the right to determine Bronte's place of residence outside of Greece. Thus

Gia's contention that her order of temporary custody grants her the right of exclusive custody is, under the Convention and ICARA, an untenable position.

Also, Emmanuel's award of permanent custody on January 16, 1997 subsequent to the removal of Bronte is enforceable under the Convention and ICARA. Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10505 (1986). Gia's belief that she had custody and could do whatever she wanted with Bronte simply is not correct and does not vitiate her wrongful removal. Emmanuel has sufficient rights of custody under the Convention and ICARA to maintain this action.

ACTUAL EXERCISE OF CUSTODY RIGHTS

The final requirement that Emmanuel must satisfy under the Convention and ICARA is that he actually exercise his rights of custody prior to Bronte's removal. The evidence is clear in this case that prior to Bronte's removal, Emmanuel exercised his rights of custody by providing care to Bronte during the time that Emmanuel, Gia and Bronte lived together, by taking steps to prevent Bronte's removal from Greece pending final orders of custody, by obtaining temporary custody of Bronte for a period of time, by obtaining and attempting to exercise rights of visitation with Bronte, and by taking all available action to secure her return to Greece once Gia had wrongfully removed Bronte. To argue that Emmanuel did not exercise his rights of custody is simply not tenable.

CONCLUSION REGARDING HABITUAL RESIDENCY AND RIGHTS OF CUSTODY

Emmanuel has met his burden under the Convention and ICARA. He has demonstrated by a preponderance of the evidence that 1) Bronte was a habitual resident of Greece

prior to her removal by Gia; 2) Emmanuel had rights of custody at the time of Bronte's removal, and 3) Emmanuel had actually exercised those rights. His application for the return of Bronte was timely filed within one year of Bronte's wrongful removal. This Court must, therefore, order the return of Bronte to Greece and Emmanuel unless Gia can demonstrate by clear and convincing evidence that one of the exceptions in Article 13(b) or Article 20 applies.

ARTICLE 13(b) DEFENSE

Gia asserts that pursuant to Article 13(b) of the Convention, a grave risk exists that would expose Bronte to physical or psychological harm if she is returned to Greece. Gia relies primarily on the testimony of Dr. David L. Winsch, a clinical psychologist. Dr. Winsch first saw Bronte on April 23, 1997 when Gia presented Bronte for examination and evaluation. Since that first visit, Dr. Winsch had seen Bronte 9 or 10 times prior to his testimony in court. Dr. Winsch testified on direct examination that Bronte was suffering from 1) post traumatic stress syndrome; 2) probable sexual, physical and emotional abuse; and 3) probable child neglect. Dr. Winsch recommended treatment for Bronte consisting of individual and family counseling, and a stable living environment. He further indicated that treatment might take years, and the potential for long term emotional behavioral problems is great if treatment is not afforded. Dr. Winsch recommended that Bronte not be returned to Greece.

On cross examination, Dr. Winsch admitted that the sole basis for his diagnosis of probable sexual, physical and emotional abuse were the statements made to him by Gia. No sexual problems appeared in the testing that Dr. Winsch did, neither did Dr. Winsch observe any sexual acting out by Bronte. This lack of sexual acting out is confirmed by the testimony of the four school employees, who each testi-

fied that they had not seen any sexual acting out by Bronte at school. A diagnosis based solely on the self-serving statements of one of the parties is no diagnosis at all, and the Court places no value on this portion of Dr. Winsch's diagnosis.

Dr. Winsch defined post traumatic stress disorder as an "extreme fear reaction from a near death experience. It requires a series of very severe events over a long period of time." Dr. Winsch offered no explanation as to what those events might have been. The evidence in this case offers no explanation for why Bronte might be suffering from this problem (if in fact she is). Emmanuel and Gia lived together with Bronte for the entirety of Bronte's life except for visits to the United States and two months in 1996 when Emmanuel had custody. The only extended period of stress to which Bronte has been subjected that has been proven by the evidence is the surreptitious and harrowing removal of Bronte from Greece by Gia, and the vagabond journey to which Bronte has been subjected thereafter, living here, there and everywhere, and being deprived of all contact with her father. There is absolutely no competent evidence before the Court that Emmanuel is responsible for Bronte's current psychological condition. There is also no evidence before the Court that medical treatment for Bronte is not available in Greece. What little evidence there is suggests just the opposite.

Finally, Dr. Winsch admitted under cross examination, that Rule 7.02 of the Psychologist's Code of Conduct requires that opinions given for purpose of court testimony must have sufficient appropriate substantiation, and that his opinion did not have that substantiation. Also, Dr. Winsch admitted that had he interviewed Emmanuel (which he did not), his opinions would be more credible and reliable.

The Court does not find Dr. Winsch's testimony compelling. It is lacking in substantiation and does not establish that returning Bronte to Greece would subject her to grave and intolerable injury. In Re Prevot, 855 F. Supp. 915 (W.D. Tenn. 1994).

The 13(b) exception under the Convention must be narrowly construed. Rydder v. Rydder, 49 F.2d 369 (8th Cir. 1995); Nunez-Escudero v. Tice-Menley, 58 F.2d 374 (8th Cir. 1995); Feder v. Evans-Feder, 63 F.3d 217 (3rd Cir. 1995). Most of the evidence presented by Gia was more closely akin to that which might be relevant in a custody proceeding. That type of evidence is not relevant in a 13(b) hearing. Tahan v. Dugquette, 613 A.2d 486 (N.J. Super. A.D. 1992); In Re Petition For Coffield, 644 N.E. 2d 662 (Ohio App. 11 Dist. 1994). In Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996) (hereinafter Friedrich II) Judge Boggs' opinion very succinctly states how the court should view the 13(b) exception:

> The exception for grave harm to the child is not license for a court to speculate on where the child would be happier. That decision is a custody matter, and reserved to the court in the country of habitual residence.

Id. at 1068.

Judge Boggs then goes on to define exactly when the 13(b) exception should apply:

> [w]e believe that a grave risk of harm for the purpose of the Convention can exist only in two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute - e.g., returning

> the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

Id. at 1069.

The evidence offered by Gia in support of her 13(b) argument, psychological and otherwise, simply does not establish that Bronte faces a grave risk of harm if she is returned to Greece. There is absolutely no competent evidence before the Court that Bronte has been abused or neglected by Emmanuel, or that Bronte faces certain danger in Greece. Likewise, there is no evidence that the courts in Greece cannot protect Bronte. Indeed, the last order issued before Gia left gave Gia temporary custody, subject to certain conditions. This Court has absolutely no reason to believe that the Greek Courts will not properly and adequately decide the ultimate issue of custody, and protect Bronte's interests in so doing. The Court concludes that Gia has failed to satisfy her 13(b) burden.

ARTICLE 20 DEFENSE

Gia also asserts that the return of Bronte to Greece should be denied pursuant to Article 20 of the Convention. Gia's burden under this Article is to show, again by clear and convincing evidence, that the return of Bronte "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. "With respect to an Article 20 defense, it places a heavy burden on the respondent." Caro v. Sher, 687 A.2d 354 (N.J. Super. Ch. 1996). The court in Caro relied on the Explanatory Report as to the adoption of

the Convention, prepared by Elisa Perez-Vera, to explain Article 20:

> To be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with those principles. . . . A study of the case law of different countries shows that the application by ordinary judges of the laws on human rights and fundamental freedoms is undertaken with a care which one must expect to see maintained in the international situations which the Convention has in view.
>
> This exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed.

Caro, supra at 359.

In Gia's case, her complaints are with the way she was treated by the Greek police and court system. Her complaints are no different than those this Court has heard many times before from defendants in proceedings in Kentucky. This Court finds no evidence that the Nation of Greece is suspect in its treatment of Gia and/or Bronte. Gia's Article 20 defense is totally without merit.

JUDGMENT

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Application of the Petitioner, Emmanuel Janakakis, is SUSTAINED and the Respondent, Gia Kalya Janakakis-Kostun is directed to deliver Bronte Janakakis FORTHWITH to the Petitioner or his designated representative.

2. That until such time as delivery of Bronte to the Petitioner occurs, Respondent shall not remove Bronte from Hardin County, Kentucky without written order of this Court.

3. Respondent shall be responsible for transportation costs related to the return of Bronte to Greece, as well as all other costs and expenses, including reasonable attorney fees, as permitted under 42 USC 11607(b)(3).

This is a final and appealable Judgment made this 12th day of November, 1997.

/s/_____
T. STEVEN BLAND, JUDGE
HARDIN CIRCUIT COURT
DIVISION I

Appendix C

HARDIN CIRCUIT COURT
DIVISION II

CIVIL ACTION NO. 97-CI-00493

IN RE: THE APPLICATION OF
EMMANUEL JANAKAKIS, PETITIONER
v.
GIA KALYNA JANAKAKIS-KOSTUN, RESPONDENT

ORDER

This matter is before the Court on motion of the Respondent seeking that the Court grant all or part of the following relief:

A. To alter, amend or vacate the Court's Findings of Fact, Conclusions of Law and Judgment dated November 12, 1997 and formally entered on November 13, 1997, pursuant to CR 59.05;

B. For a new trial pursuant to CR 59;

C. To amend the Judgment and make additional findings of fact pursuant to CR 52.02;

D. To re-open the testimony of the previous proceedings in lieu of ordering a new trial;

E. That the Court suspend and stay its final order in this matter pending any appeal pursuant to CR 62 and 65.08.

This Court made lengthy findings of fact as part of its Judgment entered November 13, 1997. The complaints of the Respondent with respect to those findings primarily consist of the argument that the Court did not make specific findings as to certain items of testimony heard during the three day trial of this matter.

When a case is tried before a Court without a jury, the Court is required to make specific findings of fact pursuant to CR 52.01. That does not mean that the Court must make a specific finding with respect to each and every bit of testimony offered or with every possible issue raised at trial. Our old Court of Appeals (now our Supreme Court) held in Shepherd v. Shepherd, Ky., 295 S.W.2d 557 (1956) that CR 52.01 was complied with "if the court's opinion shows an understanding analysis of the evidence, a resolution of the material issues of fact that penetrate beneath the generality of ultimate conclusions, and an application of the law to those facts." Id. at 558. Findings of fact should be a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred. Brown Paper Mill Co. V. Irvin, 134 F.2d 337 (8th Cir. 1943). Findings on every issue presented in a case are unnecessary if the trial court has found such essential facts as lay a basis for the decision. It is not necessary for the trial court to prepare elaborate findings on every possible issue raised at trial. Kasuri v. St. Elizabeth Hosp. Medical center, 897 F.2d 845 (6th Cir. 1990); In Re Lemmons & Co., Inc., 742 F.2d 1064 (7th Cir. 1994).

The Respondent forgets that as the finder of fact, it is the prerogative of the Court to decide the veracity of witnesses, and the credibility to be afforded them. Sullivan v. City of Paducah, Ky. App., 547 S.W.2d 769 (1977). As the Sev-

enth Circuit Court of Appeals in In Re Lemmons & Co., Inc., Supra, stated:

> When the district court makes a factual finding, *it must be assumed that conflicting testimony was rejected, even though the trial judge did not expressly state that he refused to credit such testimony.*
>
> Id. At 1070 (Emphasis added).

The findings of fact in this case speak for themselves. To the extent that other facts can be inferred from the facts found that support the Judgment, it is appropriate to assume that the Court found those facts or drew those inferences. Kasuri v. St. Elizabeth Hosp. Medical Center, Supra at 851. To the extent that evidence was presented which in the eyes of the presenter was contrary to the Court's findings, it may be assumed that said evidence was considered and rejected as having probative value. The Court finds no reason to alter, amend, vacate or modify in way whatsoever its November 13, 1997 Judgment.

With respect to the Court's interpretation of the various orders entered by the various Greek Courts, the Court has examined the materials submitted by both parties but finds nothing that causes the Court to change its mind with respect to those orders.

With respect to the request of Respondent to re-open the testimony, the Court recalls that Respondent chose not to call Bronte as a witness, and that Respondent received two days to present her case, while Petitioner received only one. In the Court's opinion, ample time was allowed for Respondent to present her case.

Finally, CR 62 and 65.08 are not applicable to this case. The Court has no authority to order a "stay" of its final judgment, and would not even if it did. The Hague Con-

vention clearly contemplates a forthwith return of the abducted child, and that is what the Court ordered.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that all post judgment motions filed by Respondent, including the motion for stay of proceedings brought under CR 62 and 65.08 are OVERRULED.

This 28th day of January, 1998.

/s/_____
T. STEVEN BLAND, JUDGE
HARDIN CIRCUIT COURT
DIVISION I

Appendix D

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 98-CA-0259-MR

GIA KALYNA JANAKAKIS-KOSTUN, APPELLANT
v.
IN RE THE APPLICATION OF
EMMANUEL JANAKAKIS, APPELLEE

APPEAL FROM HARDIN CIRCUIT COURT
ACTION NO. 97-CI-493

ORDER

This Court having considered appellant's motion for emergency relief filed in conjunction with her motion for intermediate relief pending appeal, and having considered same and being otherwise sufficiently advised, hereby determines that appellant has failed to demonstrate that she will suffer immediate and irreparable injury before the regular motion panel considers the motion for intermediate relief on March 3, 1998. Thus, it is hereby ORDERED that appellant's motion for emergency relief be DENIED.

ENTERED: Feb. 11, 1998

/s/_____
CHIEF JUDGE,
COURT OF APPEALS

Appendix E

SUPREME COURT OF KENTUCKY

98-SC-123-D

GIA KALYNA JANAKAKIS-KOSTUN, APPELLANT
v.
EMMANUEL JANAKAKIS, APPELLEE

IN SUPREME COURT

ORDER GRANTING STAY

Respondent filed a petition in the Hardin Circuit Court seeking the return of the daughter born of the marriage of the parties. The legal basis of the motion is the Convention on the Civil Aspects of International Child Abduction. (The Hague, October 25, 1980) and 42 USC 11603(b), the so-called Child Abduction Remedies Act.

A brief summary of the proceedings will bring the issues into focus. Respondent is a citizen of Greece. Movant is a United States citizen. The couple were married on September 2, 1989, in Athens, Greece. Their daughter was born on October 2, 1991, in Greece. On February 24, 1996, movant told respondent she was leaving Greece and was going to take the child to the United States. Respondent promptly filed a complaint in a Greek court, seeking temporary custody of the child. Following a March 28, 1996, hearing, respondent was awarded temporary custody. The Greek court ordered that the child could not be removed

from Greece until a formal decision was reached. At a later hearing, movant was awarded temporary custody, but the order keeping the child in Greece was left in effect.

On July 1, 1996, respondent gave custody to movant, but visitation rights were reserved for respondent. When he attempted to exercise those rights, he discovered that movant and the child had left Greece. Movant's father, a former Green Beret and probable CIA Agent, may have been involved in helping to remove the movant and the child.

In the spring of 1997, movant and the child moved to Hardin County, where they now reside. The underlying action resulted. The trial court, following an extensively researched opinion, granted respondent's motion and order that the child be delivered to him "Forthwith." Respondent was also ordered not to remove the child from Hardin County "without written order of this Court."

Movant filed an appeal to the Court of Appeals, and also filed a motion for intermediate relief, pending appeal. The latter order was denied by Chief Judge Gudgel on February 11, 1998. That order for relief was affirmed by a three judge panel on March 4, 1998.

On February 17, 1998, movant filed a motion for discretionary review in this Court of the February 11, 1998 order. This motion for an "Emergency Stay" was filed contemporaneously with that motion. CR 76.33.

There is evidence in the Greek trial record that this child is suffering from post traumatic stress syndrome; probable sexual, physical, and emotional abuse; and probable child neglect. This trial court found that, even if true, there was no evidence that respondent is responsible for this condition. The trial court concluded that the testifying doctor's testimony was not "compelling."

This is a close case. Movant certainly does not appeal before this Court with clear hands – vis-à-vis – the direct violation of the Greek court's order and the spy novel-like removal of the child. The undersigned, although recognizing the presumption of accuracy of the finding of the fact of the trial judge, does not share the view of the trial judge as to the testimony of the doctor. There is reliable evidence that the child is suffering from potentially severe problems.

Under these circumstances, and with some reservation, the undersigned believes that there is likelihood of irreparable damage to the child if custody is changed. The undersigned believes that this Court should decide the motion for discretionary review, and then the Court of Appeals should decide the appeals, on the merits, if necessary.

The decision of the Hardin Circuit Court is stayed, pending further order of this Court and the child of the parties is to stay with the movant. Movant is ordered not to remove the child from Hardin County, Kentucky.

ENTERED March 20, 1998.

/s/ _____
Chief Justice

Appendix F

SUPREME COURT OF KENTUCKY

98-SC-123-D
(98-CA-259)

GIA KALYNA JANAKAKIS-KOSTUN, MOVANT
v.
EMMANUEL JANAKAKIS, RESPONDENT

HARDIN CIRCUIT COURT
NO. 97-CI-493

ORDER

The motion for review of the decision of the Court of Appeals is denied.

The order granting a stay, which was issued by this Court on March 20, 1998, is dissolved.

Stephens, C.J., Cooper, Graves, Lambert and Wintersheimer, JJ., concurring.

ENTERED May 14, 1998.

/s/ _____
Chief Justice

Appendix G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

June 18, 1998

Mr. Philip W. Horton
Arnold & Porter
555 Twelfth Street, N.W.
Washington, DC 20004

Re: Gia Kalyana Janakakis-Kostun
v. Emmanuel Janakakis
Application No. A-956

Dear Mr. Horton:

The application for a stay pending appeal in the above-entitled case has been presented to Justice Stevens, who on June 18, 1998 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By
/s/_____
Christopher W. Vasil
Deputy Clerk

Appendix H

SUPREME COURT OF KENTUCKY

99-SC-0385-D
(98-CA-0259)

GIA KALYANA JANAKAKIS-KOSTUN, MOVANT
v.
EMMANUEL JANAKAKIS, RESPONDENT

HARDIN CIRCUIT COURT
NO. 97-CI-0493

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED December 9, 1999.

/s/_____
Chief Justice

Appendix I

The SINGLE-JUDGE COURT OF FIRST INSTANCE
OF CHANIA

JUDGMENT NO. 531/1996

Consisting of Styliani Zombola, Chairperson of Judges of Courts of First Instance and Evgenia Kapetanaki, Chief-clerk

Met in public hearing on the 23rd of May 1996 to judge the case between:

THE PETITIONER-DEFENDANT (husband): Emmanuel Tzanakakis, son of Konstantinos, lieutenant commander of the Navy, resident of Souda, who was present with his attorney at law Christina Pateraki, associated with Vasilis Panagiotopoulos, lawyer of Athens.

THE DEFENDANT-PETITIONER (wife): Gia, wife of Emm. Tzanakakis nee Kostun, resident of Souda, who was present with her attorney at law Eleni Kokkinaki, associated with Kyriakos Kokkinos, lawyer of Athens.

The petitioner-defendant (wife) requests that her petition, ref. No. /May 2nd 1996, be accepted and the defendant petitioner (husband) requests that his petition be accepted and they were assigned for the date referred to above.

During the hearing of the case the attorneys at law of the parties set forth their claims and requested that their pleas be accepted.

HAVING STUDIED THE CASE FILES,
CONCLUDED ACCORDING TO THE LAW:

The petitioner (husband) in his petition of March 8th 1996 pleads an urgent condition and requests as a security meas-

ure the adjustment of the use of the family residence of the parties, who are spouses, by changing the residence of the defendant (wife), after she takes the movable goods that are necessary for her separate maintenance. The petition is statutory. It is based on the articles 1386, 1393, 1394 Civil Code, 731, 735 Code of Civil Procedure; it is to be judged in the course of consideration of the security measures (articles 686 fol. C. Civil P.) and must be considered on its merits.

The petitioner (wife) and her petition of May 2nd 1996 pleads an urgent condition and impending danger and requests as a security measures a) that the care of the minor daughter of the parties be assigned to her temporarily, due to a change of conditions subsequent to the issuance of judgment No. 11213/1996 of the Single-Judge Court of First Instance of Athens (Security Measures), which ordered that the care of the minor be shared by both parties and rejected the petition in opposition in that case; and b) that the defendant (husband) be obliged to pay to her temporarily 50,000 drachmas per month as alimony, since she refrains from matrimonial cohabitation for legitimate reasons. This petition is also statutory, since it is based on articles 1392, 1392, 1493, 1496, 1498, 1510, 1511, 1512, 1513, 1518 Civil Code, 728, 729, 735 C. Civil P., it is brought on for consideration through the same procedure, and also must be considered on its merits as well, after having been weighed together with the preceding petition due to its relevance thereto.

The petitioner-defendant (husband) claims that the petition of the defendant-petitioner (wife) is in conflict with the temporary order resulting from the judgment of the Single-Judge Court of First Instance of Athens referred to above; if it is intended to alter and revoke the earlier judgment, this court is incompetent, since according to article 696 & 3 the

Single-Judge Court of First Instance of Athens that issued this judgment is competent to do so. These appeals, though not based on statute, on the one hand, because of the temporary effect of the judgment on security measures, binds the Court and the parties until the existence of new evidence or subsequent is shown. According to articles 696 & 3 C. Civil P. the judgment that ordered security measures but not the one that declined the initial petition, is subject to revocation; therefore a change of condition justifies

The submission of a new petition for security measures (Tzifras: Security measures e. 1980 pp. 68 and 90 fol;, Beis: Civil Procedure in articles 695 and 696 vol. 14, pp. 180 and 193).

From the testimony of the witnesses that were examined in open court, the documents that the parties introduce and invoke, their claims and the hearing of the case, the following findings were considered appropriate: The parties legally performed a civil marriage in Glyfada on September 9th 1989 from which they had a daughter Bronte-Judith-Despina, born on October 2nd 1991. Their matrimonial cohabitation though was not harmonious due to both parties. More specifically the petitioner-defendant (husband), being of a cyclothymic, inconsistent, authoritarian and violent character, and influenced to a large extent by his mother, behaved authoritatively, inconsistently and contemptuously towards the defendant-petitioner (wife), deprived her of every initiative and regularly struck her with his fists and his guns (he is lieutenant commander of the Navy Force), causing her bodily injuries, as well as hitting their minor daughter. But the defendant-petitioner (wife) was also attempting to detach him from his parental family, by convincing him to resign from his service, leave Greece and settle with her in the U.S.A., her country of origin; and in January 1990 she deserted the petitioner-defendant (hus-

band) and returned to the U.S.A. for permanent residence, but returned to Greece, after the petitioner-defendant (husband), having gone to America for this reason, dissuaded her. Due to the fact though that the same problem continued between the parties, the defendant-petitioner (wife) left the conjugal residence again and attempted to depart along with their minor daughter to the U.S.A., which did not happen since the petitioner-defendant (husband) submitted to the Single-Member Court of First Instance of Athens his petition of February 27th 1996, by which he was requested that the care of the minor be given to him temporarily, but the same request was also submitted by the defendant-petitioner (wife) with a counter-petition of her own during the hearing of the above petition. The Single-Judge Court of First Instance of Athens by its judgment No. 11213/96 accepted the petition and declined the counter-petition, and took as a sole security measure the prohibition of exit from Greece of the minor until her care was adjudicated, which care it left to both parties together, with a final court judgment, and after this the defendant-petitioner (wife) took her relevant principal legal action of May 2nd 96. However, after the issuance of the above judgment, and while the first of the petitions to be judged was pending, the defendant-petitioner (wife), due to the difficulties referred to above between them, departed on May 2nd 96 from the conjugal residence, which is the property of the Navy and has been allotted by it to the petitioner defendant (husband) as a family residence, and went to the residence of her father and witness George William Kostun, along with the minor daughter of the parties, but the petitioner-defendant (husband) went there later, took the minor and left, preventing the defendant-petitioner (wife) from continuing to care for her or to communicate with her since then.

In view of all these facts, the Court judges that the care of the minor must temporarily be assigned to her mother, de-

fendant-petitioner (wife), as required by her true interest since due to her infantile age she is in need of the presence and attention of her mother, given that the allegations of the petitioner-defendant (husband) against her were not considered convincing, he himself cannot take care of her due to his work, and the minor when living with him and his mother (her grand-mother) manifests confusion and aggressive and ill-mannered behavior (see testimony of the above witness). On the other hand, the defendant-petitioner (wife) was prohibited following the above judgment of the Single-Judge Court of First Instance of Athens from departing along with the minor from Greece, and has rented a residence in Chania and sought employment with the American Navy Force (naval base of Souda), in order that the petitioner-defendant (husband) is not deprived of his communication with the minor. It was also considered probable that the defendant-petitioner (wife) refrains for legitimate reasons, in view of the above-referenced behavior of the petitioner-defendant (husband), from matrimonial cohabitation and is therefore entitled to alimony, which according to her needs, amounts to 50,000 drachmas per month, an amount that the petitioner-defendant (husband) is in a position to pay without risking his own maintenance, given that his usual monthly salary from his above service, according to the rules of common sense and common experience exceeds the amount of 200,000 drachmas.

Therefore, both petitions should be accepted as substantially well-founded as well, as defined in the pronouncement and each party must pay its own judicial expenses due to their quality of being spouses (article 179 C. Civil P.).

FOR THESE REASONS,

Determining in the presence of both parties,

Judges the petitions of March 8th 96 and May 2nd 96 together;

Accepts them for adjudication;

Adjusts the use of the family residence of the parties and orders the departure of the defendant-petitioner (wife) from it, after she takes the movable goods that are necessary for her separate maintenance;

Assigns temporarily to the defendant-petitioner (wife) the care of the minor daughter of the parties, Bronte-Judith-Despina, until issuance of the final judgment on her main relevant legal action of May 2nd 96;

Compels the petitioner-defendant (husband) to pay temporarily to the defendant-petitioner (wife) as her alimony the amount of fifty thousand (50,000) drachmas per month, within the first five days of every month;

Orders each party to pay its own judicial expenses.

Judged, decided and published on a special public hearing of this Court, on June 24th 1996 in Chania, the parties and their attorneys at law being absent.

THE JUDGE (signed)
TRUE COPY
Chania, June 28th 1996
(signed) ARTEMIS KARTAKI
THE CHIEF-CLERK(signed)
AUTHENTICATED
For legal stamping and issuance
Chania, June 28th 1996
The Secretary
(signed) ARTEMIS KARTAKI

Emanuel Tzanakakis, son of Konstantinos, lieutenant commander of the Navy, resident of Souda Crete, a settlement of the Navy-yard in Crete, has been legally served with notice that he is ordered: a) to deliver the minor child Bronte-Judith-Despina to her mother Gia, wife of Em-

manuel Tzankakis, nee KOSTUN, who has temporary care of the minor, daughter of both parties, until issuance of the final judgment on her relevant main legal action of May 2nd 96, and b) to pay temporarily to Gia, wife of Emmanuel Tzankakis, nee KOSTUN an alimony in the amount of fifty thousand (50,000) drachmas per month, within the first five days of every month, starting on July 1st 1996.

In case of non-compliance the present will be executed in mandatory manner, the costs of execution being charged to the defendant (husband).

Chania, June 28th 1996
The attorney at law
(signed) ELENI KOKKINAKI

Appendix J

INTERNATIONAL CHILD ABDUCTION CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND OTHER GOVERMENTS DONE AT THE HAGUE OCTOBER 25, 1980

* * * *

Article I

The objects of the present Convention are--

a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

* * * *

Article 3

The removal or the retention of a child is to be considered wrongful where--

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b. at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason ofjudicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

* * * *

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that--

a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

* * * *

Appendix K

INTERNATIONAL CHILD ABDUCTION REMEDIES ACT, 42 U.S.C. § 11601 *et seq.*

§ 11601. Findings and declarations

(a) Findings

The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removal and retentions.

(b) Declarations

The Congress makes the following declarations:

(1) It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this chapter the Congress recognizes –

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

* * * *

§ 11603. Judicial remedies

(a) Jurisdiction of courts

The courts of the State and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petitions

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) Notice

Notice of an action brought under subsection (b) of this section shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) Determination of case

The court in which an action is brought under subsection (b) of this section shall decide the case in accordance with the Convention.

(e) Burdens of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence–

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing –

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) Application of Convention

For purposes of any action brought under this chapter –

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state and the

habitual residence of a child, include courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) Full faith and credit

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuance to the Convention, in an action brought under this chapter.

(h) Remedies under Convention not exclusive

The remedies established by the Convention and this chapter shall be in addition to remedies available under the laws or international agreements.

* * * *

Supreme Court, U.S.
FILED
MAR 23 2000
CLERK

No. 99-1496

IN THE
SUPREME COURT OF THE UNITED STATES

GIA KALYNA JANAKAKIS-KOSTUN
Petitioner,

v.

EMMANUEL JANAKAKIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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CINCINNATI, OHIO 800-890-5001

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STATEMENT OF THE CASE

Background

Emmanuel Janakakis is a Captain in the Greek Navy who graduated from the Naval Academy in Athens. During 1986 to 1988 he participated in a personnel exchange program with the United States Navy at the San Diego Naval Base where he met Gia Kostun. Upon his return, Gia followed him to Greece where they were married in Glyfada on September 2, 1989. They lived together in Greece thereafter, and Bronte was born in Chania on October 7, 1991. (Tape 1; 10:09:44-10:09:55).

Bronte attended kindergarten in Kounoupidiana Crete, Greece (Tape 1; 10:20:38) and preschool at the Souda Naval Base on Crete from September, 1995 to January, 1996. (Tape 1; 10:49:43; Trial Exhibit 3-2). While at the Souda Naval Base Bronte learned Greek and began speaking Greek with her Father. (Tape 1; 10:59:55, Tape 1; 14:59:35-15:01:50). Although Emmanuel lived with Gia and Bronte in military housing at the Souda Naval Base he was building homes on land he owned in Athens and Crete. (Tape 1; 14:30:20-14:31:22).

During 1995, Gia began making threats to leave Greece with Bronte telling Emmanuel he would never see Bronte's big brown eyes again. (Tape 1; 10:13:40-14:00). In the fall of 1995, Gia told Emmanuel that she was going to visit her mother in Houston, Texas during Christmas and take Bronte with her. Emmanuel replied that she could go but Bronte stayed with him at home during Christmas and that he would exercise his rights as a father to prevent Bronte from going. Gia responded that she was the mother, could do anything she wanted, and didn't care what a stupid judge

would say. (Tape 1; 10:26:20-10:27:50). In a letter to Gia's Mother in Houston, Texas, Emmanuel expressed his position regarding Bronte's staying at home during Christmas, his desire to have Bronte with him, and his fear that Gia would not return to Greece with Bronte. (Trial Exhibit 2-T; Tape 1; 10:30:22-10:34:00).

Gia was not to be denied. In January of 1996 Emmanuel received word that Bronte would be suspended from the Souda Naval Base preschool because of Gia's behavior. Emmanuel was able to persuade the teacher not to take this action, but Gia refused to let Bronte return to school. (Tape 1; 10:11:03). Previously, when Bronte attended kindergarten at Kounoupidiana, she had told Emmanuel the school bus driver had raped Bronte and the school practiced witchcraft. Emmanuel investigated the claim but found it had no foundation, although Gia testified she took Bronte to Dr. Matsuma, the child's pediatrician for an examination to determine if there had been sexual abuse and molestation. Dr. Matsuma denied that she had conducted any such examination. (Trial Record Volume II, p. 174).

On Saturday, February 24, 1996, Gia announced to Emmanuel she was taking Bronte to the States and would not be coming back. Emmanuel reported this to police but they possessed no authority to stop her. Later that day Emmanuel confronted Gia as she was leaving with Bronte and tore up Bronte's passport to prevent the child from leaving. Gia hailed a car going to the airport and from there flew to Athens. (Tape 1; 11:11:20-11:15:54).

Emmanuel called his mother in Athens and asked her to go to the airport to determine if Gia was going to attempt to leave. He called his attorney and with his help and advice prepared the paperwork for an order of temporary care of

Bronte and a criminal complaint against Gia for abduction. Emmanuel then flew to Athens. (Tape 1; 11:01:25-11:20:52). February 26, 1996 was a Greek holiday, and Gia was unable to obtain a replacement passport for Bronte at the American Embassy. On the following day, Emmanuel obtained a temporary custody order from an Athens Court and a "Security Measure" that Bronte could not be removed from Greece until further orders of Court. (Trial Exhibit B) (Tape 1; 11:44:10-11:48:09). Emmanuel, following the advice of his attorney, had Gia's name entered in the central computer of the Department of National Security and prevented Bronte from exiting Greece. (Tape 1; 11:01:25-11:23:25).

On that same day, Gia obtained a replacement passport for Bronte and attempted to leave Greece but was arrested at the Athens Airport. Later that day, Emmanuel was able to rescue Bronte and prevent her from leaving. The next day after a night in jail a Greek judge dismissed charges of abduction against Gia without objection by Emmanuel. (Tape 1; 11:23:25-11:28:15).

The custody battle for Bronte continued in the Single Member Lower Court of Chania on Crete. Emmanuel filed a petition on March 8, 1996 to remove Gia from the marital home and Gia filed a petition on May 2, 1996 for temporary care of Bronte and alimony. On June 28, 1996, pursuant to Decision No. 53-1996, Judge Zambola gave Gia temporary care of Bronte noting that the order of a lower court of Athens prohibiting Bronte's exit from Greece continued. Judge Zambola stated:

> Besides those, the defendant-petitioner (wife) cannot anymore after the above decision of the Single Member Lower Court of Athens depart along with a minor child from Greece, and has

> rented a residence in Chania and sought employment with the American Navy Force (Naval Base Souda), in order that the petitioner/defendant (husband) not be deprived of his communication (visitations) with the minor. (Tape 3; 13:37:40-14:06:00) (Trial Exhibit 16-P) (Resp. App.5a).

By order of the Single Member Lower Court of Chania on 22 July, 1996, Emmanuel received visitation with Bronte on the second and fourth weekend of every month, the first and third Wednesday of every month, Christmas holidays, January holidays, and a whole month of every year in July or August. (Trial Exhibit A) (Tape 1; 13:39:50-39:40:52) (Tape 1; 11:44:10).

Gia, through her attorney, on June 12, 1996, filed an action in the Lower Court of Chania to obtain permanent custody of Bronte seeking permission to leave Greece with Bronte to live in Seabrook, Texas. (Tape 3; 14:45:15) (Trial Exhibit 17-P). The Petition was set for trial September 5, 1996 but Gia failed to appear for the court appearance. The Chania Court continued the case until later that month and then continued it again until January 17, 1997. Gia's attorney appeared on the 5th of September, but Gia did not appear for any of the court appearances. (Tape 1; 13:26:00).

Gia's failure to appear for court confirmed in Emmanuel's mind that she had abducted Bronte from Greece. Earlier in July, Emmanuel had tried to exercise his rights to visitation by going to her apartment on two occasions without success. When Gia failed to appear in court in September, Emmanuel went to the Greek Central Authority to start proceedings for a return of Bronte under the Hague Child Abduction Convention. After obtaining court documents and

translations, Emmanuel signed on November 14, 1996 the Petition for her return. (Tape 1; 13:41:48-13:47:00) (Trial Exhibit 5-P).

During the trial Gia testified as to only two instances of any physicality by Emmanuel toward Bronte. She claimed Emmanuel pushed her down with Bronte in her arms on February 24, 1996 and during the period in which the three of them were living in the same household after the Athens Court order. (Tape 3; 16:46:10-16:47:51) (Tape 3; 11:50:57-11:51:01). Nowhere in the testimony of Gia during the trial did she testify that Emmanuel had abused her except for the two instances above. At no time in the proceedings did the trial judge prohibit Gia from testifying as to any acts of abuse or brutality towards her.

After the conclusion of the trial at the Circuit Court level and the entry of the judgment by the trial court, Gia in a motion for a new trial offered a translation of a decision by Judge Styliani Zombola of the Lower Court of Chania which purported to contain findings of fact that Emmanuel was a violent, authoritarian person who had hit Bronte and abused Gia. To rebut the translation, Emmanuel offered an explanation of the decision by A. Eleftheriadou, Head of the Greek Central Authority, who explained the decision was a temporary security measure based on "conjecture" "(guess)," which carried no evidentiary value in the "main case." (Resp. App. 10a). Emmanuel also filed a correct translation of Judge Zambola's order (Resp. App. A).

At trial, Gia offered the testimony of Dr. Winsch, a psychologist hired by her after service of Emmanuel's complaint in Hardin County, Kentucky. Winsch testified Gia hired him to make a general evaluation of Bronte for treatment, not to formulate an opinion for custody placement.

(Tape 3; 9:10:00). According to Winsch, custody opinions required more substantiation than treatment evaluations, in particular they required an interview with the father. (Tape 3; 11:40). Winsch made a diagnosis of post-traumatic stress disorder, and, without ever interviewing Emmanuel, made an additional diagnosis or gave an opinion that Bronte's condition was caused by probable sexual, physical and emotional abuse and neglect. (Tape 3; 9:40:00) (Tape 3; 10:41:27).

On cross examination Winsch admitted that without corroboration Gia's history of what had occurred in Bronte's life was taken with a grain of salt. (Tape 3; 10:29:05). He testified he made no effort to interview Emmanuel although he recognized that forensic testimony and opinion, as codified in Rule 7.02 of the Ethical Principles of Psychologists, required more substantiation than treatment decisions. (Tape 3; 10:44:00-10:46:00). He admitted his psychological testing of Bronte showed no signs of sexual abuse and his opinion, that sex abuse caused Bronte's emotional condition, rested solely on Gia's statements to him. (Tape 3; 11:24:25-11:25:20). He admitted on cross examination that the remainder of his opinion on causation, that physical abuse and neglect caused Bronte's emotional condition, was based entirely upon what Gia told him. (Tape 3; 10:50:10-10:50:40). Winsch stated that without Gia's history he would have no explanation of what events caused the emotional problems he found in Bronte. (Tape 3; 10:50:10-10:50:40). Winsch stated his testimony pertaining to Bronte carried much less weight than testimony offered in a forensic setting buttressed by substantiation of which an interview with the father would be crucial. (Tape 3; 10:45:08-10:46:00).

Winsch testified on cross examination that Gia had not informed him of the tearful and emotional separation of July

1, 1996 when Bronte was taken from Emmanuel and given to Gia for temporary care, and he was not advised of the events occurring during the abduction of Bronte from Greece. (Tape 3; 10:29:10-10:47:46-10:48:19). Winsch testified that Gia could have induced Bronte's alleged fears of Greece and of Greek men and that taking a child from a parent with whom the child had bonded, in this instance Emmanuel, could be traumatic, possibly causing serious psychological harm. (Tape 3; 10:46:00) (10:31:10-10:31:26; 10:32:20).

Allegations by Gia at trial that Bronte had scabies, pinworms and nightmares, was reduced to skin and bones and was afraid of Greek men (as told by Gia to Dr. Winsch), were dramatically rebutted by Emmanuel. Dr. Matsuma, Bronte's pediatrician, testified she had never treated Bronte for emotional problems. (Record on Appeal Vol. II, p. 197). Emmanuel offered medical records with Matsuma's entries which showed that Bronte had gained 6.6 pounds from August 31, 1995 to June 6, 1996 and had increased in height during that period. A June 6, 1996 medical examination found Bronte in good health with no problems. (Tape 1; 13:56:51-14:06:36) (Trial Exhibit 6-P). Emmanuel also introduced photographs of Bronte taken June 30, 1996, the date before her transfer to the temporary care of Gia as ordered by the Chania Court, which depicted her as a healthy child. (Trial Exhibits 9-P and 10-P) (Tape 3; 14:36:34-14:37:00). Dr. Winsch observed the photographs and stated that Bronte appeared "pretty similar to how she looks at this point." (Tape 3; 10:37:25-10:37:46). Emmanuel further testified that Bronte was never put in a cage, never had nightmares, regular vomiting, scabies, open sores, never was afraid of people from Greece, and was never punished physically by him except for a smack on the back. (Tape 1; 14:22:38) (Tape 1: 14:56:15-14:59:16) (Tape 1; 15:01:56-15:04:38). All of Gia's witnesses who testified that she had nightmares, scabies,

etc. and was afraid of people from Greece came from her relatives who observed her and viewed her after the harrowing abduction through the Balkans, which George Kostun, Gia's father, said left Bronte "half dead". (Tape 2; 10:07:40).

Misstatements of Fact

The following are Petitioner's misstatements of fact that bear on the issues of law which would be before the Court if certiorari were granted.

1. The representations that Gia made plans to leave Greece with Bronte, Mr. Kostun, her father, assisted them, and they lived in Kentucky upon their arrival to the United States is an enormous understatement. (Pet. p.4). In fact, as the trial court found, the Greek courts prohibited Gia from removing Bronte from Greece pending a final custody order, but Gia and Mr. Kostun, a former Green Beret and probable CIA agent, smuggled Bronte out of Greece in a "harrowing journey" through the Balkans "living here, there and everywhere depriving Bronte of contact with her father". (Pet. App. 32a)

2. To represent to the Court that Emmanuel filed for and received custody of Bronte in Gia's absence misleads the Court. (Pet. p.4). In fact Gia filed a divorce action in June of 1996 with the Lower Court of Chania to gain permanent custody of Bronte and to seek the Court's permission to live in Seabrook, Texas. Gia's action was scheduled to be heard September 5, 1996, at which time Emmanuel appeared and Gia's attorney appeared, but Gia was nowhere to be found. Emmanuel filed a similar action seeking permanent custody when Gia failed to appear, so

Gia's case, as well as Emmanuel's, was postponed until January 16, 1997. On January 16, 1997, Gia again failed to appear and her action was dismissed. Emmanuel proceeded with his action and the Lower Court of Chania granted him permanent custody. (See Resp. App. 12a).

3. Gia represents to this Court she presented evidence at trial that Emmanuel abused Bronte while she and Bronte lived with him. (Pet. p.5) This is a misrepresentation of the record. The trial court specifically found as follows: "There is absolutely no competent evidence before the Court that Bronte has been abused or neglected by Emmanuel. . . ." (Pet. App. 34a). The trial record is devoid of such evidence.

4. Dr. Winsch, a child psychologist, who examined Bronte on several occasions, did not find signs of physical or sexual abuse as represented here by Gia, (Pet. p.5) although he did find signs of traumatic stress disorder. The trial court specifically found that the sole basis for Dr. Winsch's diagnosis of probable sexual, physical and emotional abuse was the statements made to him by Gia. No sexual problems appeared in the testing that Dr. Winsch performed, neither did Dr. Winsch observe any sexual acting out by Bronte. The lack of sexual acting out is confirmed by the testimony of four school employees, and each testified they had not seen any sexual acting out by Bronte at school. The trial court characterized Dr. Winsch's diagnosis, which was based solely on the self-serving statements of Gia, as no diagnosis at all. The trial court further found that if Bronte was suffering from traumatic stress disorder the evidence offers no explanation for why Bronte might be suffering from this problem, and there was absolutely no competent evidence before the Court that Emmanuel was responsible for Bronte's current psychological condition. The Court further found that the only extended period of stress to which Bronte had been

subjected was the "surreptitious and harrowing removal of Bronte from Greece by Gia, and the vagabond journey to which Bronte had been subjected thereafter . . ." (Pet. App. 32a).

5. Petitioner represents to the Court that Emmanuel physically abused Gia on numerous occasions including an incident which required Gia's hospitalization. (Pet. p.5). This is an exaggeration of the record. Gia's testimony of physical abuse of her by Emmanuel is minimal. The Court of Appeals of Kentucky listed the incidents of alleged physical abuse. The Court pointed out on one occasion Gia alleged Emmanuel went into a violent rage, destroyed items in the house and pushed Gia and Bronte to the floor. Emmanuel denied this and testified he was upset when Gia allowed Bronte to get into a locked storage room where he kept his hunting guns. In his haste to get his daughter out of the room and away from the guns, a table tipped over. The Court of Appeals mentioned an occasion, alleged by Gia, when Emmanuel pulled Gia's hair so violently during a quarrel she was hospitalized with severe neck injuries. This incident occurred during the summer of 1993, three years before the abduction. Emmanuel admitted he pulled Gia's hair but testified that it was she who claimed a injury necessitated her hospitalization. There was no medical evidence to substantiate any injury causing hospitalization, and Gia did not mention this three year-old incident in her trial testimony.

6. It is a misstatement of the record before this Court that several of the custody proceedings in Greece were conducted entirely in Greek, and Gia, who does not speak Greek, did not have a court-appointed interpreter. (Pet. p. 5). At trial and on appeal, Gia has constantly argued she was without the aid of an interpreter during the Court proceedings

in Athens, which resulted in an order giving Emmanuel temporary custody and ordered Gia not to remove Bronte from Greece pending a final resolution of the custody issue. However, the record of proceedings of the Lower Court of Athens of March 28, 1996, related the appointment of Nikolaos Stamatopoulos as Gia's interpreter. (Resp. App. 15a). The only other hearing before a Greek Court was before the Lower Court of Chania convened May 23, 1996, which resulted in a change of temporary custody from Emmanuel to Gia. The third scheduled hearing occurred before the Lower Court of Chania but did not result in the taking of testimony. By agreement between Gia and Emmanuel, Emmanuel was granted liberal rights of visitation. (Resp. App. 11a). For Gia to allege here that she was prejudiced by not having a Court appointed interpreter is in the first instance untrue and in the second and third instances disingenuous. In the Greek litigation, Gia was successfully represented by several Greek attorneys, one of whom was hired through the U.S. Embassy. (Tape 1; 11:35:35). At the March 28, 1996 Athen's hearing on "Security Measures" to prevent Bronte from leaving Greece, Gia appeared with her attorney Kyriakos Kokkinos. At the hearing in the Lower Court of Chania on 23, May, 1996, when temporary custody was transferred to Gia, Christina Pateraki, attorney at law, represented her. At Emmanuel's July 4, 1996 petition for visitation before the Lower Court of Chania, attorney Helen Kokkinaki represented Gia. (Tape 1; 11:44:10). At the September 5, 1996 trial date, Gia's attorney appeared on her behalf and, in fact, had given Emmanuel notice of the hearing. (Tape 1; 41:48:00).

7. The Petitioner misrepresents the record by stating the trial court and the Court of Appeals on *de novo* review found certain facts pertaining to abuse were established by Gia (List of incidents omitted) (Pet. p. 6).

Neither the trial court nor the Court of Appeals found that Gia established any incidents of abuse toward Bronte or Gia. The Court of Appeals very carefully stated, "Gia alleges that, at trial, she established that Bronte would face an 'intolerable situation' if returned to Greece. In support of this position, Gia cites several examples of violent behavior by Emmanuel toward herself and Bronte." (list of incidents omitted) (Pet. App. 11a). The trial court found specifically that Emmanuel had not abused Bronte and made no written finding that he had abused Gia.

8. The Petitioner misrepresents the record by stating the Court of Appeals failed to consider the Chania Order and the Greek court's finding that Mr. Janakakis was abusive towards Bronte and Gia. First of all, the Greek court did not make a finding that Emmanuel was abusive toward Bronte and Gia as is amply demonstrated in the translation offered (Resp. App. 3a-3b), and the explanation of the Order by the Greek Central Authority. (Resp. App.10a). The Kentucky Court of Appeals discusses the Chania Order of June 28, 1996 as recounting "accusations of violence by Emmanuel toward [Gia] and Bronte". One must remember that the "conjecture" in the Chania Order was not part of Gia's testimony at trial and was belatedly offered by her in an effort to secure a new trial on the merits. The Kentucky courts had before them a correct translation of the Chania Order which demonstrated that the Greek judge did not make a finding of fact that Emmanuel had abused Bronte and Gia, rather the Order clearly stated that there was "conjecture (guess)" that Emmanuel was violent and authoritarian. The Greek Central Authority explained that the "decision of Security Measures is temporary and does not effect the main case (Article 695), the main case referring to the final custody decision." (Resp. App.10a). The Petitioner will remember that during arguments before the Kentucky Court of Appeals

Judge Wilfred Shroeder commented that the Greek "Security Measures" procedure was similar to the procedure in Kentucky for obtaining an Emergency Protective Order which is temporary and can be based on the mere affidavit of an accusing spouse.

9. Finally, a careful review of the trial proceedings and the record reveals it was Gia who raised the issue of the competency and willingness of the Greek courts to protect Bronte and her. Gia introduced evidence, her unsubstantiated testimony, about the failure of the Greek courts to provide interpreters and claims of Emmanuel's great influence with the government. Gia claimed she faced unfairness and danger if she stayed in Greece or returned there. (Pet. App. 35a, 16a). That was the substance of her case at trial, not Emmanuel's alleged abuse, allegations that arose after the trial. When the trial court wrote that there is absolutely no competent evidence before the court that ". . . Bronte faces certain danger in Greece", the court was responding to Gia's allegations; not redefining Article 13b. (Tape3; 10:03:97; 11:45:29) (Tape 2; 10:02:97; 16:52:56; 16:56:50) Tape 2; 10:02:97; 17:04:25) (Tape 3; 10:03:97; 11:36:39; 11:54:30; 12:15:37).

10. Petitioner stated that Gia presented to the court evidence regarding the leniency of Greek courts towards domestic violence. (Pet. p. 17). That is not a true statement. There was no evidence before the trial court regarding such leniency. In the Petitioner's Brief before the Kentucky Court of Appeals there is a gratuitous insertion of a U.S. Department of State Report on that issue, but that is not competent evidence. Likewise, the June 24, 1997 Order of the Lower Court of Chania (Resp. App. A) is not competent evidence. It was filed of record to support a motion for a new trial, but never offered as evidence at the trial level.

Misstatement of Law

11. The Petitioner seems to assume throughout her argument and statement of the facts that the Kentucky Court of Appeals is a fact finding body which reviews the evidence, not just the law, *de novo*. The Kentucky Court of Appeals reviews the trial court's findings of fact to determine if they were clearly erroneous and gives due regard to the opportunity of the trial court to judge the credibility of the witnesses. (Ky. R. Civ. Proc. (CR) 52.01). The Kentucky Court of Appeals is not permitted to conduct a *de novo* review of the facts and substitute its judgment for the trial courts. (Pet. App. 16a).

ARGUMENT

The Kentucky trial court's finding of fact confirmed by the Kentucky Court of Appeals, that Emmanuel had not physically or psychologically abused Bronte and that she faced no risk of harm by returning to Greece, makes this case inappropriate to challenge the 13(b). analysis of *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1966). An analysis of the Janakakis facts using *Friedrich* is a two step process only if, first, the court finds serious abuse or neglect or extraordinary emotional dependence." If serious abuse and neglect are found the court must, second, determine if the courts of the child's habitual residence are able to protect the child. 78 F.3d at 1069. Although the Kentucky courts cited *Friedrich* and analyzed the facts of the Janakakis case in light of *Friedrich*, the analysis was not carried to the final issue, i.e. [w]ere the Greek Courts competent and willing to protect Bronte? Bronte fortunately did not need to be protected by Emmanuel as there was no abuse on his part.

Gia's questions for review to the Court are premised upon misstatements of fact from the Record and a faulty assumption regarding the Kentucky courts' application of *Friedrich* to the facts in *Janakakis*. The first question, "[d]oes the 'grave risk' exception require a court to exclude evidence of alleged 'physical or psychological harm' (including admitted evidence of violence in the home), if such harm does not include evidence of direct physical abuse of the child?", makes no sense in the context of a trial where the trial court did not exclude evidence of physical or psychological harm. The Kentucky trial judge considered the evidence but found it lacking in credibility and probative value. (Pet. App. C). The trial court did not exclude any proffered evidence of spouse abuse; Gia just did not offer much.

The second question, "[b]efore a trial court may deny a petition for return of the child under the 'grave risk' exception, the court is also required to find that the country of habitual residence is unable to provide the child with adequate protection, when that requirement is not found in the plain language of Article 13(b)?", makes no sense in the context of a trial and appellate court decision which found that the requesting father did not cause psychological and physical harm to the child and, if there was harm, it was likely caused by the mother. Who knows what the Court would have done if Bronte had faced a "grave risk" of harm from Emmanuel. That issue was not explored by the trial court because, obviously, Emmanuel presented no risk to Bronte. The trial court merely restated the *Friedrich* analysis, but it was unnecessary to do so. (Petitioner App. 33a).

For the same reasons the assertion that the Kentucky Court of Appeals has diverged from *Friedrich* by requiring "certain harm" rather than "grave risk of harm" is nonsense.

The trial court not the appellate court used the phrase "certain danger", perhaps as a response to Gia's claim she could get no protection from the Greek courts, but it was merely a literary description and not the creation of a new legal standard for Article 13(b). (Pet. App. 34a). After a full and fair reading of the trial judge's opinion, a fair-minded person could not reach a contrary conclusion. The trial court found: "There is absolutely no competent evidence before the Court that Bronte has been abused or neglected by Emmanuel or that Bronte faces certain danger in Greece. (Pet. App. 34a). The decision of the Kentucky Court of Appeals does not repeat the phrase when it adopted the trial court's analysis and does not make "certain harm" or "certain danger" part of the 13(b). exception.

It is certainly misleading to argue, as does the Petitioner, that the Kentucky Court of Appeals required Gia to prove that the courts in Greece were incapable or unwilling to give Bronte adequate protection. Reading both decisions, the trial court's and the appellate court's, in their entirety leads any reasonable person to conclude that the courts were merely restating the entire *Friedrich* analysis. The Kentucky courts could have properly ended the analysis after concluding that Bronte faced no harm from her father. In fact the Kentucky courts could have cited just as easily *Blondin v. Dubois*, 189 F.3d 240 (2nd Cir 1999) or *Steffen v. Severina*, 966 F. Supp. 922, cases which the Petitioner arraigns against *Friedrich* to present a conflict of authority. In *Blondin* the circuit court recognized that the district court had concluded the child sought to be returned actually faced a "grave risk of harm" from returning to France, her place of habitual residence, but remanded the case to the district court to fashion a return order that would protect the child from the father. The court noted this would preserve the objectives and spirit of the Convention. *Blondin*, 189 F.3d at 248. In

Steffen v. Severina, 966 F. Supp. at 927, the district court, citing *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995), rejected the *Friedrich* analysis, but this was a case in which the court determined the child sought to be returned would face a "grave risk of harm" in being separated from the mother. In contrast the Kentucky trial court found that any emotional or psychological harm to Bronte more likely came from the mother. As the trial court noted, "[t]he only extended period of stress to which Bronte has been subjected that has been proved by the evidence is the surreptitious and harrowing removal of Bronte from Greece by Gia, and the vagabond journey to which Bronte has been subjected thereafter, living here, there, and everywhere, and being deprived of all contact with her father." (Pet. App. 32a).

If the court uses this case to review *Friedrich*, it will have to review do novo the findings of the trial court and conclude Emmanuel presented a "grave risk of harm" as defined by Article 13(b) or revisit the Kentucky Court of Appeal decision that the trial court's findings of fact were not clearly erroneous.

CONCLUSION

The relief the Respondent seeks is for this Court not to grant certiorari, but to leave intact the findings of the trial court judge and the decision of the Kentucky Court of Appeals. This case is not an appropriate vehicle by which to challenge the 6th Circuit's Decision in *Friedrich*.

Respectfully submitted,

/s/_____

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APPENDIX A

EXACT TRANSLATION OF-
THE ATTACHED DOCUMENT
FROM GREEK TO ENGLISH
CHANIA 30-3-1998
THE TRANSLATOR
PROKOPIOS VARDOULAKIS
ATTORNEY AT LAW

Decision Number 531/1996

The

SINGLE MEMBER LOWER COURT OF CHANIA

Consisting of Styliani Zombola, President of Lower Court Judges and Evgenia Kapetanaki, Secretary

Met in public hearing on the 23rd May 1996 to judge the case between:

THE PETITIONER - DEFENDANT (husband) Emmanuel Tzanakakis, son of Konstantinos, commander of the Navy, resident of Souda, who was present with his attorney at law Christina Pateraki, legalizing Vasilis Panagiotopoulos, lawyer of Athens.

THE DEFENDANT - PETITIONER (wife): Gia, wife of Emm. Tzanakakis, nee Kostun, resident of Souda, who was present with her attorney at law Eleni Kokkinaki, legalizing Kyriakos Kokkinos, lawyer of Athens.

Translation of Decision No. 531/1996

The petitioner-defendant (wife) requests that her petition, ref. No /May 2nd 1996, be accepted and the defendant-petitioner (husband) requests that his petition be accepted and they were signed for the date referred to above. During the hearing of the case the attorneys at law of the parties set forth their claims and requested that their please be accepted.

AFTER STUDYING THE BRIEF
THOUGHT ACCORDING TO THE LAW:

The petitioner (husband) in his petition of March 8th 1996 pleads an urgent condition and requests as a security measure the adjustment of the use of the family residence of the parties, who are spouses, by changing the residence of the defendant (wife), after she takes the movable goods that are necessary for her separate maintenance. The petition is legal. It is based on the articles 1386, 1393, 1394 Civil Code, 731, 735 Civil Affairs, Legal Proceedings Code (C.A.L.P.C.), it is to be judged in the course of consideration of the security measures (articles 686 fol. C.A.L.P.C.) and must be considered on its merits.

The petitioner (wife) with her petition of May 2nd 1996 pleads an urgent condition and impeding danger and requests as security measures that the care of the minor daughter of the parties be assigned to her temporarily, due to a change of conditions subsequent to the issuance of decision No 11213/1996 of the Single-Member Lower Court of Athens (Security Measures), which ordered that the care of the minor be shared by both parties and rejected the petition in opposition in that case; and b) that the defendant (husband) be obliged to pay to her temporarily 50.000 drachmas per month

alimony, since she refrains from matrimonial cohabitation for reasonable reasons. This petition is also legal, since it is based on articles 1391, 1392, 1493, 1496, 1498, 1510, 1511, 1512, 1513, 1518 Civil Code, 728, 729, 735 C.A.L.P.C., it is brought on for consideration through the same procedure, and also must be considered on its merits as well, after having been weighted together with the preceding petition due to its relevance thereto.

The petitioner-defendant (husband) claims that the petition of the defendant-petitioner (wife), is in conflict with the temporary order resulting from the decision of the Single-Member Lower Court of Athens referred to above; if its is intended to alter and revoke the earlier judgment, this court is incompetent, since according to article 696 & 3 the Single-Judge Court of First Instance of Athens that issued this judgment is competent to do so. These appeals, though not based on statute, on the one hand, because of the temporary effect of the judgment on security measures, binds the Court and the parties until the conjecture of existence of new elements or subsequent is shown.

According to article 696 & 3 C.A.L.P.C. the judgment that ordered security measures but not the one that declined the initial petition, is subject to revocation; therefore a change of condition justifies the submission of a new petition for security measures (Tzifras: Security measures ed. 1980 pp. 68 and 90 fol., Beis: Civil Procedure in articles 695 and 696 vol. 00. 180 and 193).

From the testimony of the witness that were examined in open court, the documents that the parties introduce and invoke their claims and the hearing of the case, the following

were conjectured: The parties legally performed a civil marriage in Glyfada on September 9th 1989 from which they had a daughter Bronte-Juduth-Despina, born on October 2nd 1991. Their matrimonial cohabitation though was not harmonious due to both parties. More specifically the petitioner-defendant (husband) being of a cyclothymic, inconsistent, authoritarian and violent character, and influenced to a large extent by his mother, behaved authoritatively, inconsistently and contemptuously toward the defendant-petitioner (wife), deprived her of every initiative and was hitting her with his fists and his guns (he is commander of the Navy) causing her bodily injuries, as well as hitting their minor daughter. But the defendant-petitioner (wife) was also attempting to detach him from his parental family, with purpose to convince him to resign from his service, leave Greece and settle with her in the U.S.A., her country of origin; and in January 1990 she deserted the petitioner-defendant (husband) and returned to the U.S.A. for permanent residence, but returned to Greece, after the petitioner-defendant (husband), having gone to America for this reason, dissuaded her. Due to the fact though that the same problem continued between the parties, the defendant-petitioner (wife) left the conjugal residence again and attempted to depart along with their minor daughter to the U.S.A., which did not happen since the petitioner-defendant (husband) submitted to the Single-Member Lower Court of Athens his petition of February 27th 1996, by which he was requested that the care of the minor be given to him temporarily, but the same request was also submitted by the defendant-petitioner (wife) with a counter-petition of her own during the hearing of the above petition. The Single Member Lower Court of Athens by its judgment No. 11213/96 accepted the petition and declined the counter-petition, and

took as a sole security measure the prohibition of exit from Greece of the minor until her care was regulated which care it left to both parties together, as it is concluded from its grounds with a final court judgment, and after this the defendant-petitioner (wife) filed her relevant principal legal action of May 2nd 96. However, after the issuance of the above judgment, and while the first of the petitions to be judged was pending, the defendant-petitioner (wife), due to the problems referred to above between them, departed on May 2nd 96 from the conjugal residence, which is the property of the Navy and has been allotted by it to the petitioner-defendant (husband) as a family residence, and went to the residence of her father and witness George William Kostun, along with the minor daughter of the parties, but the petitioner-defendant (husband) went there later, took the minor and left, preventing the defendant-petitioner (wife) from continuing to care for her or to communicate with her since then.

In view of all these the Court judges that the care of the minor must temporarily be assigned to her mother, defendant-petitioner (wife) as required by her true interest since due to her infantile age she is in need of the presence and care of her mother, given that the allegations of the petitioner-defendant (husband) against her were not conjectured he himself cannot take care of her due to his work, and the minor which lives with him and his mother (her grand-mother) manifests confusion and aggressive and ill-mannered behavior (see testimony of the above witness). Besides those, the defendant-petitioner (wife) cannot any more after the above decision of the Single-Member Lower Court of Athens depart along with the minor from Greece, and has rented a residence in Chania and sought employment with the

American Navy Force (naval bases of Souda), in order that the petitioner-defendant (husband) is not deprived of his communication (visitations) with the minor. It was also conjectured that the defendant-petitioner (wife) refrains for reasonable causes in view of the above-referenced behavior of the petitioner-defendant (husband), from matrimonial cohabitation and is therefore entitled to alimony, which according to her needs, amounts to 50.000 drachmas per month, an amount that the petitioner-defendant (husband) is in a position to pay without risking his own maintenance, given that his usual monthly salary from his above service, according to the rules of common sense and common experience exceeds the amount of 200.000 drachmas.

Therefore, both petitions should be accepted as substantially well-founded as well as defined in the pronouncement and each party must pay its own judicial expenses due to their quality of being spouses (article 179 C. Civil P.).

FOR THESE REASONS.

Determining in the presence of both parties,

Judges the petitions of March 8th 96 and May 2nd 96 together;

Accepts them for adjudication;

Adjusts the use of the family residence of the parties and orders the departure of the defendant-petitioner (wife) from it, after she tales the movable goods that are necessary for her separate maintenance;

Assigns temporarily to the defendant-petitioner (wife) the care of the minor daughter of the parties, Bronte-Judith-Despina, until issuance of the final judgment on her main relevant legal action of May 2nd 96;

Compels the petitioner-defendant (husband) to pay temporarily to the defendant-petitioner (wife) as her alimony the amount of fifty thousand (50,000) drachmas per month, within the first five days of every month;

Orders each party to pay its own judicial expenses.

Judged, decided and published on a special public hearing of this Court, on June 24th 1996 in Chania, the parties and their attorneys at law being absent.

THE JUDGE
(signed)

THE CHIEF-CLERK
(signed)

TRUE COPY
Chania, June 28th 1996
The Secretary

ARTEMIS KARTAKI
(singed)

AUTHENTICATED
For legal stamping and issuance
according to order of request

Chania, June 28th 1996
The Secretary
(signed) ARTEMIS KARTAKI

Emmanuel Tzanakakis, son of Konstantinos commander of the Navy, resident of Souda Crete, a settlement of the Navy-yard in Crete, has been legally served with notice that he is ordered: a) to deliver the minor child Bronte-Judith-Despina to her mother Gia, wife of Emmanuel Tzanakakis, nee KOSTUN, who has temporary care of the

minor, daughter of both parties, until issuance of the final judgment on her relevant main legal action of May 2nd 96 and b) to pay temporarily to Gia, wife of Emmanuel Tzanakakis, nee KOSTUN an alimony in the amount of fifty thousand (50,000) drachmas per month, within the first five days of every month, starting on July 1st, 1996.

In case of non-compliance the present will be executed in mandatory manner, the costs of execution being charged to the defendant (husband).

Chania, June 28th 1996
The attorney at law
(signed)
ELENI KOKKINAKI

APPENDIX B

EXPLANATION OF GREEK LEGAL PROCEEDINGS BY A. ELEFTHERIADOU, CENTRAL AUTHORITY FOR HELLENIC REPUBLIC

HELLENIC REPUBLIC
MINISTRY OF JUSTICE
DIRECTION A
SECTION 4

24 December 1997

To Mr. Stephen
McMurtry
attorney at law
USA

Subject : JANAKAKIS case.

Dear Mr. Mc Murtry

Referring to the above case and after the questions you submitted we inform you the following about the procedure of security measures concerning to the applicable articles of the Civil affairs Legal proceedings code and about the case in subject specifically.

GENERAL INFORMATION

1) Security measures are ordered by the court in urgent situations (because it is short procedure) (article 682).

2) *In cases of security* measures pre-evidence is obligatory and conjecture (guess) of the claims is enough (it is not necessarily to have an evidence of the facts). Keeping of records is not obligatory and it is up to the judge to have records kept or not (article 690).

3) The decision of security measures is temporary and does not affect the main case (article 695).

4) The decision which ordered a security measure can be retracted fully or partially if :

a) a definite decision of the trial for the main case against the person who had requested the security measure is issued and this decision becomes final (decision of the court of appeals).

b) a definite decision which benefits him is issued and it is executed.

c) a compromise is agreed on the main case.

5) Decision accepting or rejecting applications for security measures can not be offended by any legal mean unless otherwise defined (the decision can not be appealed).

INFORMATION OF JANAKAKIS CASE

In application of the above in Janakakis case we inform you the following:

Explanation of Greek Legal Proceedings

1) The term main case mentioned above is the regulation of the final custody-care of the daughter of Emmanuel and Gia Janakakis.

2) By the decision 11213/1996 the lower court of Athens according to security measures procedure decided a security measure prohibiting the exit of the child from Greece until a final decision is made on the main case (custody of the child).

3) By the decision 531-1996 the Lower Court of Chania – according to security measures procedure – assigned temporarily the care of the child to Gia Janakakis. This decision does not retract the security measures ordered by the decision 11231/96 of the Lower Court of Athens which is the prohibition of the exit of the child from Greece because it is not a final decision on the main case. This is mentioned clearly in the decision 531/1996. As mentioned in par. 2 of General information this decision is not necessarily based on evidence but conjectures are enough. This is why the term conjecture is repeatedly mentioned in all security measures decisions.

4) By the decision 617/1996 the Lower Court of Chania – under the procedure of security measures – defined the temporary regulation of communication (visitation) of Emmanuel Janakakis with his daughter. It is mentioned that the mother consented to the greatest part of the requested communication (visitation).

5) All the above decision are considered security measures and are temporary and do not affect the main case (final custody) as mentioned in par. 3 of the above general information.

6) For resolution of the main case the following main legal actions were filed in the Lower Court of Chania.

a) Gia Janakakis.

Legal action protocol No 376/12-6-96 requesting exclusive custody otherwise care of her daughter and allowance to move to TEXAS, U.S. or. stay in CRETE, GREECE.

This was scheduled for the September 5 of 1996 and after postponement for the January 16 of 1997.

b) Emmanuel Janakakis.

Legal action protocol No 498/29-7-96 requesting exclusive care of his daughter scheduled for the January 16 of 1997.

The Lower Court of Chania by its decision 80/1997 after a trial on January 16 of 1997 on the above legal action of Em. Janakakis assigned exclusively the exertion of the care of the child to Em. Janakakis.

arti/ps (SEAL) The Head of Section
A. ELEFTHERIADOU

APPENDIX C

THE LOWER COURT OF ATHENS
SECURITY MEASURE SECTION

DECISION NUMBER 11.213/1996

THE SINGLE MEMBER LOWER COURT OF ATHENS

Consisted of Judge Erotokritos Kaloudis president of the Lower Court Judges appointed by the President of the three - member Council of the Lower Court Administration.

Held a public session to its audience on the 28-3-1996 (28 March 1996) without the collaboration of a secretary to judge the case between

The applicant Emmanuel Janakakis of Konstantine, resident of the Naval Station Crete Housing, who appeared with his attorney Visilios Panagiotopoulos.

The defendant - counter applicant Gia wife of Emmanuel Janakakis, Kostun resident of Souda Crete, Naval Station Crete Housing and already temporarily residing inn Athens at **ATHINAIS HOTEL** who appeared with her attorney Kyriakos Kokkinos.

The applicant asks for the acceptance of his application from 27-2-1996 (27 Febr 1996) (Introduction Statement Number 2751/96) which was designated for the 6-3-96 (6 March 96), and was postponed for the above trial date and was registered in the statement.

During the discussion of the application and counter – application which are judged together because of relevance the attorneys of the litigants promoted their allegations and asked, that they become accepted.

AFTER STUDYING THE BRIEF
THOUGHT ACCORDING TO THE LAW

The applicant, with his application from 27-2-1996 (27 Feb 1996) introduction statement Number 2751/1996 calls upon an urgent circumstance and asks as a security measure the temporary assignment to him of the care of his not adult child, which he attained with the defendant, his wife, from who he is separated since she abandoned the family residence in Chania taking their child with her and came to Athens, where she is temporarily residing, with the intention to fly to the U.S.A., and settle there permanently. The application is responsibly introduced to be discussed in this court during the Procedure of Security Measures (Articles 682, 683, para. 3 and 686 of the Civil Affairs Legal Proceedings Code).

It is based on the regulations of the articles 1510, 1511, 1512, 1513, 1514, 1518, of the Civil Code and 735 of the Civil Affairs Legal Proceedings Code. Consequently it must be discussed further down essentially.

The defendant with a counter – application which she introduced verbally during the discussion, also calls upon an urgent circumstance and asks, as a security measure the temporary assignment to her of the care of her not adult child. The counter – application was introduced acceptably according to the Civil affairs Legal Proceedings Code and must be judged together with the application because of

obvious relevance and must also be examined further down essentially.

From the sworn testimony of the witness Maria Karyda and the, without oath examination of the defendant counter - applicant with the assistance of Nikolaos Stamatopoulos who was assigned by the Court as an interpreter (Civil Affairs Legal Proceedings Code Article 415) and from the documents the litigants present the following were supposed:

(3)

No. 99-1496

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
AUG 25 2000
CLERK

GIA KALYNA JANAKAKIS-KOSTUN, PETITIONER

v.

EMMANUEL JANAKAKIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Article 13b of the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) permits a court to deny a petition for return of an abducted child to the country of the child's habitual residence where "there is grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Petitioner seeks to present the following questions:

1. Whether a court considering application of the "grave risk" exception must exclude evidence of potential harm that does not include evidence of direct physical abuse of the child.

2. Whether a court may invoke the "grave risk" exception without finding that the country of habitual residence is unable or unwilling to protect the child from the threatened harm.

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In the Supreme Court of the United States

No. 99-1496

GIA KALYNA JANAKAKIS-KOSTUN, PETITIONER

v.

EMMANUEL JANAKAKIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is a United States citizen who married respondent, a Greek citizen, in Greece in 1989. Their daughter Bronte was born in Chania, on the island of Crete, in October 1991. Pet. App. 2a, 21a-22a.[1]

In 1995, petitioner threatened to leave respondent and to take Bronte with her. In February 1996, respondent filed a criminal complaint charging petitioner with interfering with his custodial rights, and asked a civil court in Athens to award him temporary custody of Bronte. The Athens court scheduled a hearing on respondent's petition, and issued an interim order requiring that Bronte remain in Greece. Acting under that order, Greek authorities stopped peti-

[1] We relate the facts as they are presented in the opinions of the courts below.

tioner at the airport as she sought to leave the country, with Bronte, on February 27. The Athens court then held a hearing, awarded respondent temporary custody, and again ordered that Bronte remain in Greece pending a final custody determination. The criminal charges against petitioner were dropped. Pet. App. 2a-3a, 22a.

Petitioner and Bronte returned to live with respondent. In May 1996, however, petitioner took Bronte to a hotel where petitioner's father, George Kostun, was staying. Respondent retrieved Bronte from the hotel, and thereafter refused to let petitioner communicate with her. Pet. App. 3a, 22a-23a.

Petitioner then sought custody of Bronte by filing an action in a court in Chania. On June 28, 1996, the Chania court scheduled a hearing on the merits of that request for September 5, 1996, and granted petitioner temporary custody pending that hearing. The court noted that the Athens court's earlier order, requiring that Bronte remain in Greece, remained in effect. On July 1, respondent delivered Bronte to petitioner, in compliance with the Chania court's order. He also sought visitation and communication rights, which the Chania court granted on July 22. Respondent was not able to exercise those rights, however, because in late July or early August petitioner and her father, whose service in the United States Army had left him with a number of European contacts, smuggled Bronte out of Greece and, ultimately, to the United States. Pet. App. 3a-4a, 23a.

In the meantime, respondent had filed his own custody action in the Chania court on July 27, 1996. Respondent also attended the September 5 hearing that had previously been set to consider petitioner's request for custody. The court set a new date of January 16, 1997, to hear both custody cases together. At that hearing, the court awarded respondent sole custody of Bronte. Pet. App. 4a-5a, 24a.

2. In November 1996, respondent sought the assistance of the governmental authority responsible for the administration, in Greece, of the Hague Convention on the Civil Aspects of International Child Abduction (the Convention), T.J.A.S. No. 11,670. Pet. App. 5a. In March 1997, respondent located petitioner and filed this action in the Circuit Court of Hardin County, Kentucky, invoking the Convention and seeking an order requiring that Bronte be returned to Greece. *Ibid.*; see International Child Abduction Remedies Act (the Implementing Act), 42 U.S.C. 11603 (granting jurisdiction and establishing procedures for cases arising under the Convention).

After taking evidence, the court concluded that respondent had carried his burden of demonstrating that Bronte's "habitual residence" was Greece and that her removal by petitioner violated custodial rights that respondent had exercised under Greek law. Article 12 of the Convention therefore entitled respondent to an order of return unless petitioner could establish the applicability of an exception. Pet. App. 18a, 24a-31a; see 42 U.S.C. 11603(e) (allocating burdens of proof). In that regard, petitioner contended that returning Bronte to Greece would "expose the child to physical or psychological harm or otherwise place [her] in an intolerable situation," within the meaning of Article 13(b) of the Convention (reprinted at Pet. App. 57a)).[2]

In support of that argument, petitioner offered the opinion of a clinical psychologist that Bronte was suffering from post-traumatic stress syndrome, had probably been ne-

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[2] Petitioner also argued that "the way she was treated by the Greek police and court system" would make an order of return inconsistent with "the fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms." Convention Art. 20; see Pet. App. 34a-35a. Petitioner does not renew that argument in this Court, and we do not address it.

glected and subjected to sexual, physical and emotional abuse, and should not be returned to Greece. Pet. App. 31a. Petitioner also offered evidence intended to show that respondent was violent and unstable, including that his regular manner of punishing Bronte was to give her a "smack on the back"; that on one occasion he "went into a violent rage, destroyed items in the house, and pushed [petitioner] and Bronte to the floor"; that on one occasion, during a quarrel, he pulled petitioner's hair so violently that she was hospitalized with severe neck injuries; and that on one occasion, he tore up Bronte's passport. See *id.* at 11a-12a.

Having considered the evidence presented to it, the court assigned "no value" to the psychologist's opinion that Bronte had been abused, because it was "based solely on * * * self-serving statements" by petitioner, and not corroborated by testing or observation. Pet. App. 31a-32a. It found the doctor's opinion concerning traumatic stress similarly unsubstantiated and unpersuasive. *Id.* at 32a-33a. Indeed, the court observed that "the only extended period of stress [for Bronte] * * * proven by the evidence" involved her "surreptitious and harrowing removal * * * from Greece by [petitioner], and the vagabond journey to which [she] ha[d] been subjected thereafter, living here, there and everywhere, and being deprived of all contact with her father." *Id.* at 32a. Noting that petitioner's evidence was "more closely akin to that which might be relevant in a custody proceeding" than to the sort of evidence that would show the existence of a "grave risk of harm" if Bronte were returned to Greece, the court concluded that there was "absolutely no competent evidence * * * that Bronte ha[d] been abused or neglected by [respondent]," that she faced "certain danger in Greece," or that "the Greek Courts [would] not properly * * * decide the ultimate issue of custody, and protect Bronte's interests in so doing." *Id.* at 33a-34a. Accordingly,

the court held that petitioner had failed to demonstrate the applicability of the Article 13(b) exception, and it ordered petitioner to deliver Bronte to respondent for return to Greece. *Id.* at 36a.

Petitioner asked the circuit court to reconsider its decision or to stay its order pending appeal, but the court denied those motions on January 28, 1998. Pet. App. 37a-40a. The state court of appeals also refused to stay the order pending appeal. *Id.* at 41a, 43a. The Chief Justice of the Supreme Court of Kentucky stayed the order temporarily, *id.* at 42a-44a, but on May 14 the full court dissolved that stay and declined to review the court of appeals' refusal to grant a stay pending appeal. *Id.* at 45a. On June 18, 1998, Justice Stevens also denied petitioner's application for a stay. *Id.* at 46a. On June 29, 1998, petitioner delivered Bronte to respondent, who took her back to Greece. Pet. App. 5a; Pet. 7.

3. Petitioner's appeal nonetheless remained pending in the Kentucky Court of Appeals, which, on March 19, 1999, affirmed the circuit court's order of return. Pet. App. 1a-17a. In rejecting petitioner's argument that return should have been refused under Article 13(b), the court of appeals adopted, verbatim, the reasoning of the lower court. *Id.* at 12a-14a. The Supreme Court of Kentucky denied discretionary review. *Id.* at 47a.

DISCUSSION

Petitioner seeks to present two questions concerning the Hague Convention's "grave risk" exception: Whether a court evaluating a "grave risk" claim may consider evidence of potential harm that does not involve "direct physical abuse" of the child, and whether the court may find that a "grave risk" exists without first concluding that the child's home country is unable or unwilling to provide the child with adequate protection through its own legal processes. While those questions are potentially important, there is no need

for this Court to review them at the present time, and this case would not be a suitable vehicle for their consideration. Accordingly, the petition should be denied.

1. The Hague Convention, to which both the United States and Greece are parties, embodies an agreement that child-custody decisions should almost always be made by the legal system of the contracting State in which the child has habitually resided. That agreement rests on the premises that international abduction of a child in derogation of established custody rights usually harms the child; that one party to a custody dispute should not be allowed to obtain custody, or to change the rules or forum for the custody determination, by abducting the child to a different jurisdiction; and that "only concerted cooperation pursuant to an international agreement can effectively combat" and deter such abductions. 42 U.S.C. 11601(a); see also Convention, introductory declarations and Article 1.[3]

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful" if it is "in breach of rights of custody" enjoyed by another person "under the law of the State in which the child was habitually resident immediately before the removal." *Id.* Art. 3(a). Where, as here, an aggrieved party commences proceedings under the Convention within one year of the wrongful removal, authorities in the State where the child is found are generally bound to "order the return of the child forthwith." *Id.* Art. 12. While proceedings under the Con-

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[3] The English-language text of the Convention is reprinted at 51 Fed. Reg. 10,498-10,502 (1986), together with an analysis (the State Department Analysis) prepared by the Department of State and submitted to the Senate Committee on Foreign Relations in connection with the Senate's consideration of the Convention. See *id.* at 10,494, 10,503-10,516.

vention are pending, authorities in the requested State are not to decide custody issues on the merits; and any custody decision made by that State before the commencement of Convention proceedings, or that would be entitled to recognition in that State but for the Convention, "shall not be a ground for refusing to return a child under th[e] Convention." *Id.* Arts. 16-17. Likewise, any decision made concerning return under the Convention "shall not be taken to be a determination on the merits of any custody issue." *Id.* Arts. 16-17, 19.

The Convention recognizes a few permissible (not mandatory) exceptions to the rule of return, including the one at issue in this case: The requested State is not bound to order the return of a child if the person opposing return establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention Art. 13(b).[4] Article 13 provides that in determining the applicability of that exception, "the judicial and administrative authorities [of the requested State] shall take into account the information relating to the social background of

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[4] The remaining exceptions apply where the person whose custody rights the removal violated was not actually exercising those rights; where that person consented to, or later acquiesced in, the removal; where the child objects to being returned and "has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views"; and where return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention Arts. 13, 20. If proceedings are commenced more than one year after the removal, the requested State may also decline to order return if "it is demonstrated that the child is now settled in [his or her] new environment." *Id.* Art. 12.

the child provided by the Central Authority or other competent authority of the child's habitual residence."[5]

In the Implementing Act, 42 U.S.C. 11601 *et seq.*, Congress established procedures for requesting return of an abducted child from the United States, authorizing both state and federal courts to hear petitions for return and to decide them "in accordance with the Convention." 42 U.S.C. 11603(d). Children determined to have been wrongfully removed are to be "promptly returned," unless the party opposing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). With respect to the "grave risk" exception under Article 13(b), the Act specifies not only that the party opposing return bears the burden of persuasion, but also that the exception must be established by "clear and convincing evidence." 42 U.S.C. 11603(e)(2)(A).[6] The Act also confirms that "[t]he Convention and [the Act] empower courts in the United States to determine only rights under the Convention[,] * * * not the merits of any underlying child custody claims." 42 U.S.C. 11601(b)(4).

2. Petitioner argues that the Kentucky courts applied the "grave risk" exception too narrowly in this case, by

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[5] Each State designates a Central Authority to discharge various duties imposed by the Convention. Convention Art. 6. Under the Implementing Act, the President has designated the Office of Children's Issues in the State Department's Bureau of Consular Affairs as the Central Authority for the United States. See 42 U.S.C. 11606(a); 22 C.F.R. 94.2. That Office has engaged the National Center for Missing and Exploited Children to process applications for the return of abducted children.

[6] The Act requires "clear and convincing" proof to invoke either the "grave risk" exception under Article 13(b) or the "fundamental principles" exception under Article 20. 42 U.S.C. 11603(e)(2)(A). The remaining exceptions allowed by Articles 12 and 13 (see note 4, *supra*) may be established by a preponderance of the evidence. 42 U.S.C. 11603(e)(2)(B).

limiting their consideration of potential harm to evidence of likely "direct physical or sexual abuse" of Bronte (Pet. 11; see Pet. 10-15), and by taking some account of the likelihood that appropriate Greek authorities could provide whatever protection might be necessary under their own child-custody and domestic-relations procedures (see Pet. 15-17). We see no error in the state courts' application of Article 13(b).

a. The limited power to refuse return under Article 13(b) must be construed in light of the Convention's central premises that custody disputes should be resolved in the State of the child's habitual residence, and that the incentive to abduct children may be sharply reduced by enforcement of an agreement among States to abide by that norm. See pp. 6-7, *supra*; Elisa Pérez-Vera, *Explanatory Report* ¶ 19, *reprinted in* 3 *Acts and Documents of the Fourteenth Session on Child Abduction* (Permanent Bur. of the Hague Conf. on Private Int'l Law ed. (1982)) (Explanatory Report) ("[T]he Convention rests implicitly upon the principle that any debate on the merits of * * * custody rights, should take place before the competent authorities in the State where the child has its habitual residence prior to its removal."); see also *id.* ¶¶ 11-18.[7] The Implementing Act reiterates the principle that courts in the United States considering a petition for return are "to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. 11601(b)(4).

Article 13(b) and the Implementing Act do plainly authorize courts in this country to undertake some inquiry into the

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[7] Elisa Pérez-Vera served as official reporter for the Convention. The Explanatory Report is recognized by the Hague Conference on Private International Law, and by the Department of State, as "the official history and commentary on the Convention and * * * a source of background on the meaning of the provisions of the Convention." State Department Analysis, 51 Fed. Reg. at 10,503; see also, *e.g.*, *Blondin* v. *Dubois*, 189 F.3d 240, 246 n.5 (2d Cir. 1999).

conditions that will face an abducted child if he or she is sent home under the Convention. See *Nunez-Escudero* v. *Tice-Menley*, 58 F.3d 374, 377-378 (8th Cir. 1995); *Tahan* v. *Duquette*, 613 A.2d 486, 489 (N.J. Super. Ct. App. Div. 1992); *Explanatory Report* ¶ 117 (noting that information provided by home-country authorities under the third paragraph of Article 13, which calls for the provision of information "relating to the social background of the child," may be "particularly valuable" in determining "the existence of those circumstance which underlie the exceptions [to return] contained in the first two paragraphs"). Proof that return would actually place a child back in the physical custody of a parent who has abused the child in the past is one example of a proper ground for invoking the exception provided by that Article. See State Department Analysis § III(I)(2)(c), 51 Fed. Reg. at 10,510; but see note 11, *infra*; see also *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) ("grave risk" might be established by showing that return would expose child to "imminent danger" from war, famine, or disease, without regard to outcome of custody dispute). In principle, moreover, we agree with petitioner (see Pet. 11-13) that the evidence she adduced "indicating that [respondent] had a violent temperament with * * * [a] history of[] abusing his wife" (Pet. 9; see Pet. 5-6) was potentially relevant to establishing a "grave risk" of "physical or psychological harm" harm to Bronte (Convention Art. 13(b)), and that it would have been error if the state trial court had excluded or refused to consider that evidence.[8]

Nonetheless, the arguments typically raised by abducting parties in opposing return often bear a strong resemblance to the sorts of contentions concerning parental fitness and the best interests of the child that are frequently at the

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[8] As we explain below, the state courts did not refuse to consider petitioner's evidence in this case. See pp. 12-13, *infra*.

heart of child custody disputes. Courts hearing Convention proceedings must therefore exercise restraint in applying Article 13(b), lest the "grave risk" exception swallow the rule that States who join the Convention will respect each other's respective legal processes for determining custody. As Pérez-Vera explains:

> [T]he Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at the international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence—are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the [Convention] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

Explanatory Report ¶34; see also *id.* ¶116 ("Each of the terms used in [Article 13(b)] is the result of a fragile compromise reached during" Convention negotiations); 42 U.S.C. 11601(a)(4) (exceptions to mandatory return are "narrow"), 11603(e)(2)(A) (requiring "clear and convincing evidence" to invoke "grave risk" exception); State Department Analysis § III(I)(2)(c), 51 Fed. Reg. at 10,510 ("grave risk" provision "was not intended to be used * * * to litigate (or relitigate) the child's best interests"); *Walsh* v. *Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863, at *10 (1st Cir. July 25, 2000) (quoting *Explanatory Report* ¶ 34); *Blondin* v. *Dubois*, 189

F.3d 240, 246 (2d Cir. 1999); *Friedrich*, 78 F.3d at 1067; *Nunez-Escudero*, 58 F.3d at 376; *Rydder* v. *Rydder*, 49 F.3d 369, 372 (8th Cir. 1995).[9]

b. Petitioner argues (Pet. 9) that the Kentucky courts improperly "ignored" or "dismissed" evidence that respondent has a "violent temperament" and had abused petitioner. The decisions below, however, indicate that the courts received and considered petitioner's evidence, but ultimately gave it little credence, and found it insufficient to demonstrate the sort of "grave risk" of harm to Bronte that would authorize a court in the United States to depart from the Convention's rule of return. See Pet. App. 11a-14a.

As the court of appeals recognized (Pet. App. 12a), the trial court specifically discredited the proffered opinion of petitioner's psychologist that Bronte had been abused in the past and would be exposed to harm if returned to Greece. *Id.* at 31a-33a. Similarly, the courts did not refuse to consider petitioner's claims that respondent had mistreated her and Bronte. See *id.* at 11a-12a, 33a-34a; see also *id.* at 39a (observing, in rejecting motion for reconsideration, that "[t]o the extent that evidence was presented which in the eyes of the presenter was contrary to the Court's findings, it may be assumed that said evidence was considered and rejected as having probative value"). Rather, both courts concluded that petitioner's evidence "[did] not establish that Bronte face[d] a grave risk of harm if she [were] returned to Greece," and could instead be presented to the Greek courts as part of the ordinary custody proceeding that petitioner

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[9] Caution is particularly appropriate because allegations of abuse, while they must of course be taken very seriously, are often easy to make and difficult to refute (particularly in a distant forum). They therefore offer one obvious way for an abducting parent to "attempt to stave off [a] return order[] in the name of the child's welfare." Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 Law & Contemp. Probs. 209, 267 (Summer 1994).

had improperly pretermitted by smuggling Bronte out of Greece. *Id.* at 12a-14a, 33a-34a. Particularly in light of the "clear and convincing evidence" standard imposed by the Implementing Act on "grave risk" claims under Article 13(b) (see 42 U.S.C. 11603(e)(2)(A)), there is no reason to question that conclusion.

Petitioner also argues (Pet. 13-15) that the state courts applied too demanding a standard of proof in this case, because they observed (Pet. App. 13a, 34a) that there was "no competent evidence * * * that Bronte faces certain danger in Greece." Read in context, the courts' phrase "certain danger" probably either refers to the sort of general, unavoidable risk of physical harm that might face a child who was returned to "a zone of war, famine, or disease," rather than to the chance that Bronte might be harmed by being returned to respondent's custody, or else is simply a way of stating that the evidence in this case does not satisfy the *Friedrich* test just articulated by the court. See *id.* at 13a, 33a-34a (quoting *Friedrich*, 78 F.3d at 1069). In any event, it is not inconsistent with the Convention's "grave risk" standard. The phrase "certain danger" does not, as petitioner suggests (see Pet. 13-14), imply that harm will actually occur. "Danger" is a synonym for "risk," and one can be "in danger" and yet escape unharmed. In that sense, a requirement that "danger" (or "risk") be "certain" would be met *more easily* than the Convention's actual requirement that "risk" not only exist, but also be "grave." Cf. State Department Analysis III(I)(2)(c), 51 Fed. Reg. at 10,510 ("The person opposing the child's return must show that the risk to the child is grave, not merely serious."). There is, however, no reason to believe that the courts' phrase, used in passing, was intended to alter or circumscribe the "grave risk" standard itself.

c. Finally, petitioner contends (Pet. 15-17) that the state courts erred by taking into account, in their Article 13(b)

analysis, the presumptive competence of the Greek courts to assess and protect Bronte's interests in resolving the question of custody. See Pet. App. 13a-14a, 34a. It is questionable whether deference to the Greek courts' ability to protect Bronte made a difference in this case, because the Kentucky courts were not persuaded that respondent had abused or neglected his daughter, or that she would be mistreated if returned to his care. See *id.* at 12a-14a, 34a. Even if the courts had given petitioner's evidence on that score greater credence, however, it would have been appropriate for them to look to their Greek counterparts to "adequately decide the ultimate issue of custody, and protect Bronte's interests in so doing." *Id.* at 34a.

The Convention aims to prevent child abductions by discouraging potential abductors' hopes of escaping from, or finding a more favorable forum for, custody disputes that should be resolved through ordinary legal processes in the jurisdictions where they first arise. See pp. 7-8, 11-12, *supra.* Thus, the Convention itself reflects agreement by each signatory State "that the authorities of one of them—those of the child's habitual residence—are in principle best placed to decide upon questions of custody and access." *Explanatory Report* ¶ 34. That agreement presupposes that the authorities in each State are ordinarily able to manage and resolve a custody dispute in a manner that is fully consistent with what the Convention recognizes is the "paramount importance" of protecting the personal safety and other interests of the child. See Convention, introductory declarations; see also Art. 7(h) (duties of the Central Authorities established under the Convention include "provid[ing] such administrative arrangements as may be necessary and appropriate to secure the safe return of the child"). That is the basis on which we expect our treaty partners to act when they are asked to order the return of a child who has been abducted from the United

States. When the situation is reversed, our own courts must be willing to do the same. See *Blondin*, 189 F.3d at 248-249; *Friedrich*, 78 F.3d at 1068.

As the courts below recognized, there may occasionally be cases in which it appears that authorities in the child's home jurisdiction are "incapable or unwilling to give the child adequate protection." Pet. App. 13a, 34a (quoting *Friedrich*, 78 F.3d at 1069). A court is free, under Article 13(b) and the Implementing Act, to consider a claim to that effect, and to refuse an order of return where "clear and convincing evidence" demonstrates that home-country authorities cannot or will not act appropriately to protect a returned child. 42 U.S.C. 11603(e)(2)(A); see *Blondin*, 189 F.3d at 250.[10] See, *e.g.*, *Walsh*, *supra*, 2000 WL 1015863, at *14-*15 (invoking Article 13(b) where father in Ireland was very violent and had disobeyed court orders in United States and Ireland, and court concludes that even a potential barring order would not be sufficient to protect children from grave risk). Ordinarily, however, courts in the United States should look to authorities in the child's home country to protect the child and to make other appropriate decisions concerning custody.[11]

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[10] Article 13(b) provides specifically for the consideration of "information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." See also *Explanatory Report* ¶ 117 (that information provision seeks in part "to compensate for the burden of proof placed on the person who opposes the return of the child"). The duties of Central Authorities also include "provid[ing] information of a general character as to the law of their State in connection with the application of the Convention." Convention Art. 7(e).

[11] The same principle qualifies the statement in the State Department Analysis, 51 Fed. Reg. at 10,510, that a court could appropriately deny return if a child was abducted "to safeguard it against further victimization" by a sexually abusive parent. That example assumes that the child would be returned to the physical custody of a parent who is in fact

3. The need to balance the Convention's general rule of return and its limited exception for situations of "grave risk," see pp. 9-12, *supra*, means that decisions in individual cases will often turn on particular factual circumstances. Appellate decisions applying the "grave risk" exception do not, however, presently reveal any conflict on matters of legal principle of the sort that would warrant review by this Court.[12]

Petitioner argues (Pet. 10-13) that the "grave risk" test articulated by the Sixth Circuit in *Friedrich*, 78 F.3d at 1069, and applied by the Kentucky courts in this case, Pet. App. 12a-14a, excludes consideration of harm that might be inflicted on a child by relatively indirect means—in this case, allegedly, by forcing the child to live in an environment of spousal abuse. That argument misreads *Friedrich*, which states that potential abuse must be "serious" in order to invoke the "grave risk" exception, see 78 F.3d at 1069, but nowhere suggests that evidence of a generally abusive home environment could not demonstrate the grave risk of "physical or psychological harm" contemplated by Article 13(b). Nor does anything in *Friedrich* conflict with decisions like *Tahan* v. *Duquette* and *Nunez-Escudero* v. *Tice-Menley*,

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abusive. In an actual case, a court should not ordinarily deny return to the country of habitual residence unless there is reason to believe that authorities in that jurisdiction have failed or would fail to respond appropriately to allegations of abuse. That rule best serves the Convention's central goal of discouraging international child abductions.

[12] Petitioner cites a number of decisions by district courts or state courts of first instance. It is true that the emphasis on prompt return in the Convention (Arts. 1(a), 11) and the Implementing Act (42 U.S.C. 11601(a)(4)) may lead to many cases being finally resolved by courts of first instance. The judgments of such courts are not, however, precedential, and their legal analysis is subject to later revision or disapproval by appellate courts. Any errors in or conflicts with or among existing trial-level decisions provide no basis for review by this Court at the present time.

which acknowledge the need for "some evaluation of the people and circumstances awaiting [the] child in the country of his habitual residence," *Nunez-Escudero*, 58 F.3d at 378, but also properly emphasize that the inquiry must be narrowly focused on potential serious harm to the child, and should not extend to "[p]sychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships," or other evidence that "bear[s] upon the ultimate issue" of who should be granted custody, *Tahan*, 613 A.2d at 489. See *Nunez-Escudero*, 58 F.3d at 377-378 (evidence of abuse was overly "general," "concern[ed] the problems between Tice-Menley, her husband and [her] father-in-law" rather than any problems between the father or grandfather and the child, and hence was "irrelevant to the Article 13b inquiry"); see also *Blondin*, 189 F.3d at 246-247 (endorsing finding that children faced risk of physical abuse based in part on evidence of previous abuse of mother, but also citing both *Friedrich* and *Nunez-Escudero* for the proposition that the "grave risk" exception must be narrowly construed).[13]

Petitioner cites (Pet. 16) the statement in *Nunez-Escudero*, 58 F.3d at 377, that "Article 13b requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint." That case does not, however, conflict with the recognition by the courts below, and in *Friedrich* and *Blondin*, that a child generally will not face a "grave

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[13] One state appellate case cited by petitioner, *In re Coffield*, 644 N.E.2d 662, 665 (Ohio Ct. App. 1994), adopts the unduly narrow rule that a "grave risk" may be found "only when the general environment of the home country poses a risk, not [when the risk involves] the specific environment in which the child will live." That erroneous view has not, however, been reviewed or adopted by the Ohio Supreme Court, or revisited in light of later cases in this developing area, such as *Nunez-Escudero*, *Friedrich* and *Blondin*.

risk" of harm when returned under the Convention, because the legal system of the home jurisdiction will normally provide appropriate protection. See Pet. 15-17. In the statement petitioner cites, the *Nunez-Escudero* court sought only to make clear that the existence of a custody tribunal and other protection mechanisms was not the *only* relevant inquiry. 53 F.3d. at 377-378. Nothing in the decisions below, or in *Friedrich* or *Blondin*, is inconsistent with that position. Rather, the decisions uniformly recognize that a court considering a "grave risk" claim under Article 13(b) must consider all available evidence concerning the situation that will actually face a particular child upon return, including *both* "the people and circumstances awaiting that child in [his or her] country," *Nunez-Escudero*, 58 F.3d at 378, *and* how those "people and circumstances" might be affected, provisionally or permanently, by "any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might *otherwise* be associated with a child's repatriation," *Blondin*, 189 F.3d at 248 (emphasis added).[14]

4. Even if there were conflict among the lower courts on the questions petitioner seeks to present, this case would not be an appropriate vehicle for this Court's consideration of those issues. First, as we have noted (see pp. 12-13, *supra*), the state courts in this case did not exclude or refuse to consider any of the evidence proffered by petitioner, and yet they were not persuaded that petitioner's daughter would

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[14] Petitioner seeks to rely (Pet. 16) on the decision of the district court on remand in *Blondin*. See *Blondin* v. *Dubois*, 78 F. Supp. 2d 283 (S.D.N.Y. 2000), appeal pending, No. 00-6066 (2d Cir.) (argument scheduled for September 12, 2000). That decision is not, of course, authoritative. See note 12, *supra*. Indeed, the United States has filed an amicus curiae brief with the Second Circuit supporting reversal of the district court's decision. We have provided copies of that brief to the parties in this case, and we have lodged a copy with the Clerk of this Court.

face *any* substantial risk of harm if she were returned to Greece, presumptively in the custody of respondent. Thus, it is not clear that either of the legal questions presented by the petition was material to the state courts' resolution of this case.

Second, because petitioner did not succeed in securing a stay pending appeal, Bronte Janakakis was delivered into respondent's custody and returned to Greece in June 1998. She has apparently been living in Greece, and subject to the plenary custody jurisdiction of the Greek courts, since that time. Pet. App. 5a. Although the Kentucky Court of Appeals proceeded to decide this case on appeal, and although the parties make no mention of the issue, the case appears to be effectively moot. In any event, nothing in the Convention would require courts or other authorities in Greece to give binding effect to any judgment of this Court purporting to reverse or vacate an order of return that has already been fully executed, and it is at best uncertain what other legal or practical effects, if any, might attend such a judgment. That uncertainty counsels strongly against granting review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2000